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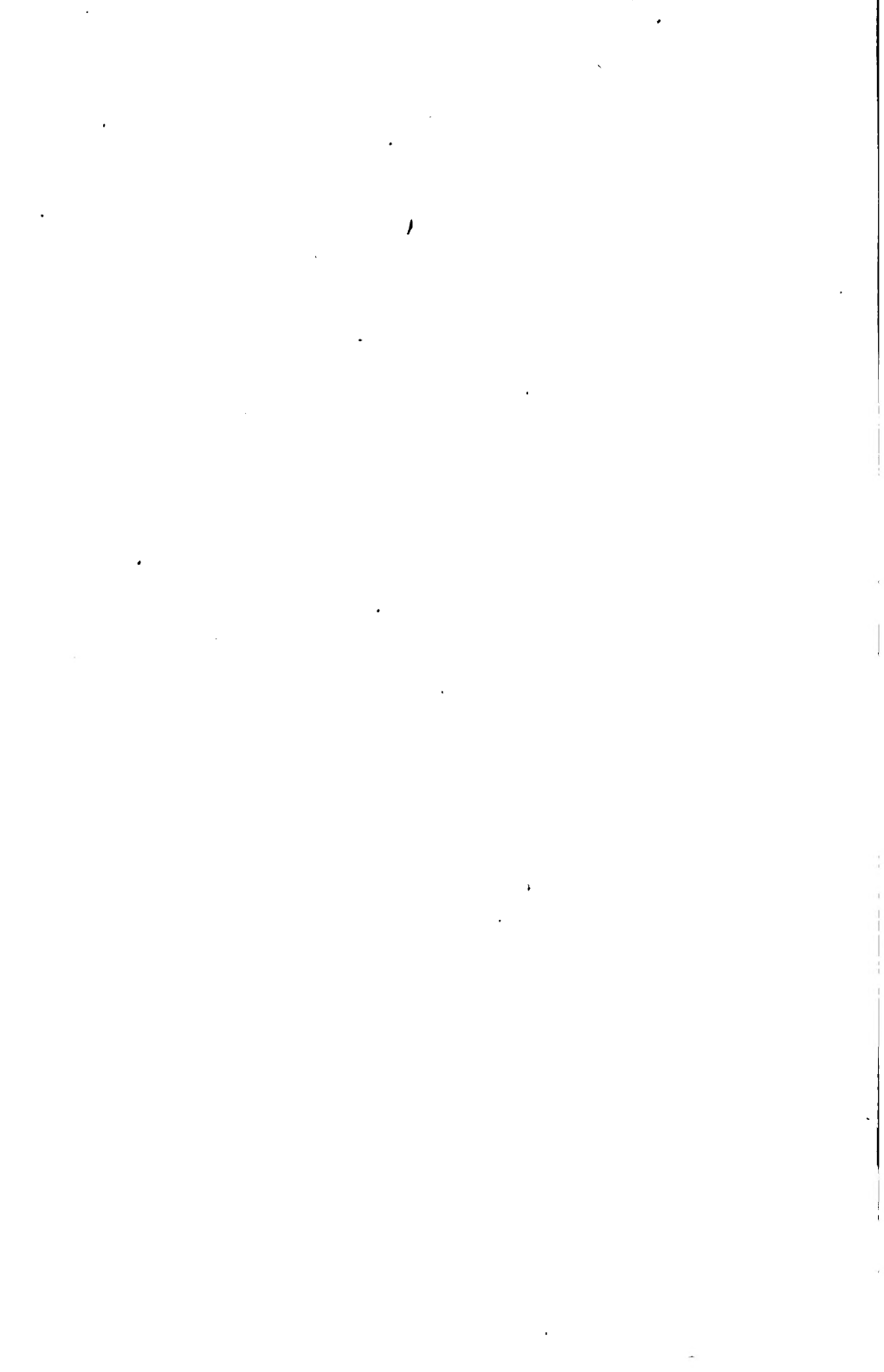
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THE LAW OF TORTS

A TREATISE
ON THE ENGLISH LAW OF
LIABILITY FOR CIVIL INJURIES

BY

JOHN W. SALMOND

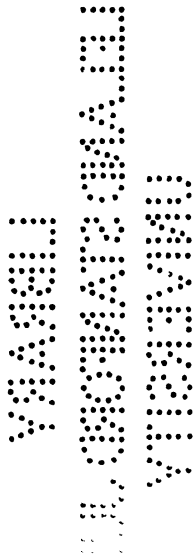
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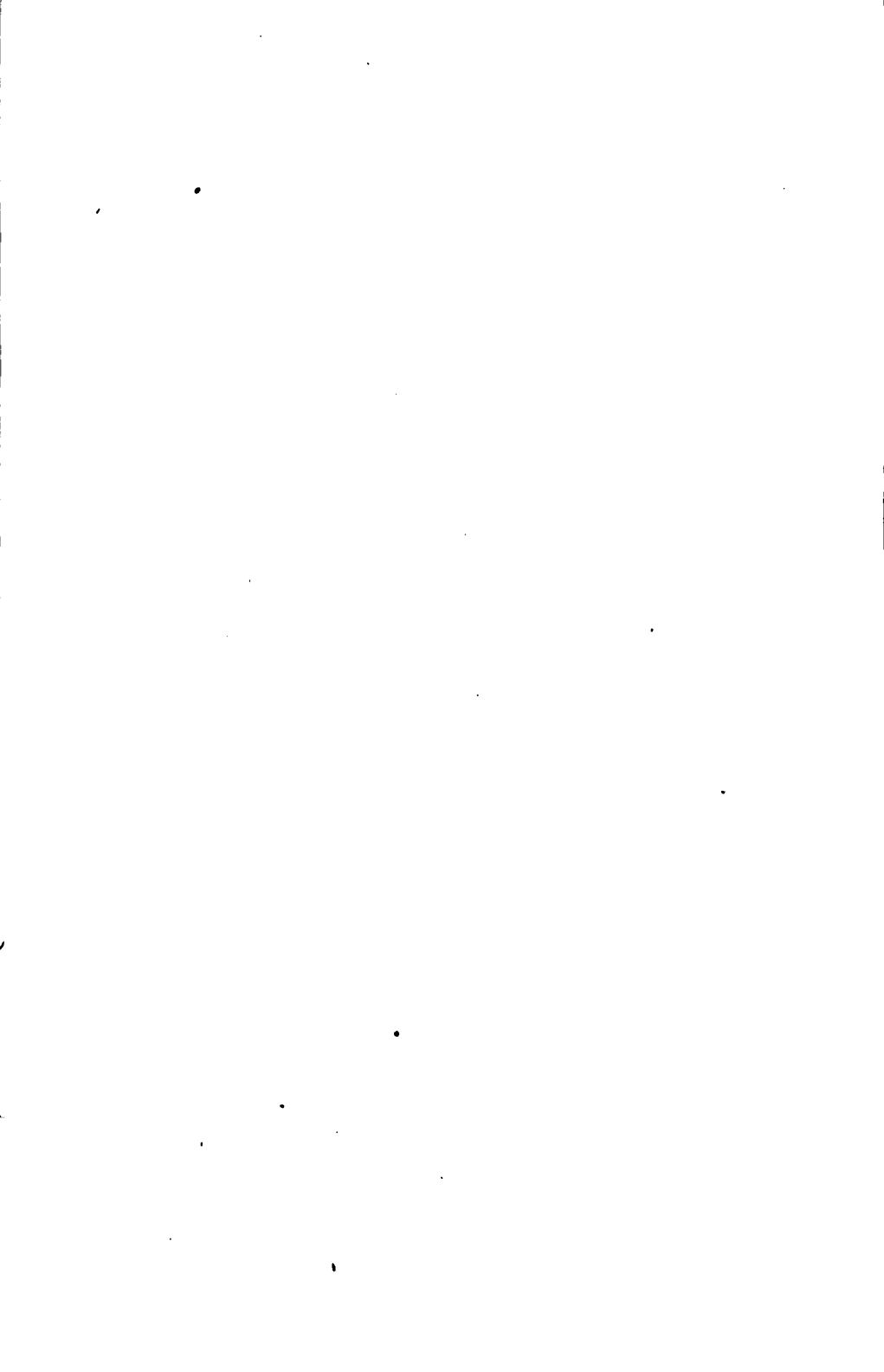
PREFACE.

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I have endeavoured in this book to set forth the principles of the law of torts with as much precision, coherence and system as the subject admits of, and with as much detailed consideration as is necessary to make the work one of practical utility. No book is justified by the good intent of its author, but I hope that the present work will be found of use to lawyers and to students of law, as a general exposition, in moderate compass, of an extensive and in some respects difficult and imperfectly developed department of our legal system.

J. W. S.

WELLINGTON, NEW ZEALAND,

AUG. 5, 1907.



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 Wright *v.* Lefever, 358.
 ——— *v.* Leonard, 64.
 ——— *v.* London & N.W. Railway Co., 93.
 ——— *v.* Midland Railway Co., 336.
 ——— *v.* Stavert, 222.
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Yarmouth *v.* France, 47, 49, 50, 98.
 Ydun, The, 130.
 Young *v.* Bankier Distillery, 261, 264.
 ——— *v.* Davis, 276.
 ——— *v.* Macrae, 428.

THE LAW OF TORTS.

CHAPTER I.

GENERAL PRINCIPLES OF LIABILITY.

§1.—The Nature of a Tort.

1. A tort is a species of civil injury or wrong. The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law. A civil wrong is one which gives rise to civil proceedings—proceedings, that is to say, which have as their purpose the enforcement of some right claimed by the plaintiff as against the defendant : for example, an action for the recovery of a debt, or for the restitution of property, or for the specific performance of a contract, or for an injunction against a threatened injury, or for the recovery of damages for an injury committed. Criminal proceedings, on the other hand, are those which have for their object the punishment of the defendant for some act of which he is accused. He who proceeds civilly is a claimant, demanding the enforcement of some right vested in himself ; he who proceeds criminally is an accuser, demanding nothing for himself, but merely the punishment of the defendant for a wrong committed by him.

It is often the case that the same wrong is both civil and criminal—capable of being made the subject of proceedings of both kinds. Assault, libel, theft, and malicious injury to property, for example, are wrongs of this kind. Speaking generally, in all such cases the civil and criminal remedies are not alternative but concurrent, each being independent

of the other. The wrongdoer may be punished criminally by imprisonment or otherwise, and also compelled in a civil action to make compensation or restitution to the injured person.

Action for damages the essential remedy for a tort.

2. Although a tort is a civil injury, all civil injuries are not torts, there being certain classes of such injuries which for special reasons are excluded from this department of the law. In the first place no civil injury is to be classed as a tort unless the appropriate remedy for it is an action for damages. Such an action is an essential characteristic of every true tort. Thus a public nuisance is not to be deemed a tort, merely on account of the fact that the civil remedy of injunction may be obtained at the suit of the Attorney General; it is a tort only in those exceptional instances in which a private person may recover damages for loss sustained by him in consequence thereof. Nor is a refusal to perform a statutory duty a tort, if the only remedy is a *mandamus*. Nor is any wrong a tort, if the appropriate remedy is an action not for unliquidated damages, but for a liquidated sum of money: *e.g.* an action for money paid by mistake, or due under a judgment, or paid to the use of another without contract. Such claims are classed by our law as quasi-contractual, being based on a fictitious contract implied in law, but in truth they belong neither to the sphere of contract nor to that of tort.

Although an action for damages is the essential remedy for a tort, there may be and often are other remedies also. In an action for a private nuisance an injunction may be obtained in addition to damages. In an action for the detention of a chattel an order for specific restitution may be obtained, if the plaintiff pleases, instead of judgment for its value. In an action by a plaintiff dispossessed of his land he recovers the land itself, in addition to damages for the loss suffered during the period of his dispossession. But in all such cases it is solely by virtue of the right to damages that the wrong complained of is to be classed as a tort.

Torts and breach of contract.

3. In the second place no civil injury is to be classed as a tort if it is solely a breach of contract. Breach of contract is a species of wrong which stands apart from all others and

is governed by a special body of law different in many important respects from that which determines other forms of civil liability.

It is often the case, however, that the same wrong is both a breach of contract and a tort ; and this happens in at least two ways. In the first place there are many instances in which a person voluntarily binds himself by a contract to perform some duty which already lies upon him independently of any contract. The breach of such a contract is also a tort, inasmuch as liability for it would equally have existed had there been no contract at all. For example, a physician who harms his patient by negligently administering a deleterious drug, is guilty of a wrong which is both a breach of contract and a tort. It is a breach of contract, because the physician has impliedly promised to use due care and skill in the treatment of his patient ; and it is also a tort, because apart from contract altogether no one has a right to do another physical harm by giving him poison. Similarly a bailee who wrongfully refuses to restore the property lent to him is liable both in contract and in tort : in contract because of his promise to restore it in due time, and in tort because no one has a right to detain another's property without some special justification. So also in all other cases in which, by a wilful or negligent act of misfeasance, harm is done to the person or property of another in the course of performing a contract made with him which involves the use of care and skill : for example, injury done to a borrowed horse by over-driving it.

Concurrence
of tort and
breach of
contract.
First mode.

4. There is, however, a second and more difficult form of the concurrence of tort and contract ; there are cases in which the defendant takes upon himself by contract a duty which did not precedently and independently exist, and yet the breach of which is at the same time a tort. The explanation of these cases is that the defendant has by his contract—although it is a contract to do something which he was not otherwise bound to do—put himself in such a situation that he cannot now break that contract without at the same time causing damage to the person or property of another, and so committing a tort by violating a right which existed independently of contract. If I lend my horse to one who

Second
mode of
concurrence.

injures it by overdriving, he is, as we have already seen, guilty of a tort as well as a breach of contract; for the duty not to overdrive another person's horse exists at common law independently of any contract. But if he kills the horse by omitting to give it food, it may be assumed with some confidence that he is equally guilty of a tort: yet he was under no obligation to feed the horse except by reason of his contract to do so. The failure to supply food is *per se* merely a breach of contract, but the killing of the horse by reason of this failure is a tort; for I have a right apart from contract that my horse shall not be killed, and the defendant, by undertaking to feed it and by failing to do so, has been the direct cause of the animal's death, just as much as if he had killed it by administering poison or by any other misfeasance. Therefore if A lends his horse to B, who lends it to C, who starves it to death, we may assume that A would have a good cause of action in tort against C, and that C could not plead that he owed no duty save a contractual one towards B.

It must not be supposed, indeed, that there is any general rule of English law that he who, by breaking a contract with one person, causes harm to another, is liable to that other in an action of tort. In general, as we shall see in the sequel, he is under no such liability, and owes no duty save to the person with whom he contracted.¹ Nevertheless in certain exceptional instances this concurrence of contractual and delictal liability does exist, and we are here concerned not with the details of the matter, but merely with the significance of such concurrence in respect of the nature and definition of a tort.^{2 3}

¹ *Dickson v. Reuter's Telegram Co.* (1877) 3 C.P.D. 1; *Earl v. Lubbock* (1905) 1 K.B. 253.

² The concurrence of contractual and delictal liability is illustrated by the following cases, in all of which the act of the defendant was held to be a tort, although clearly at the same time a breach of contract: *Bryant v. Herbert* (1878) 3 C.P.D. 389 (wrongful detention of chattel lent); *Kelly v. Metropolitan Rly. Co.* (1895) 1 Q.B. 944 (injury to passenger through negligence of railway servant); *Taylor v. Manchester etc. Rly. Co.* (1895) 1 Q.B. 134 (the same); *Foulkes v. Metropolitan Rly. Co.* (1880) 5 C.P.D. 157 (the same); *Turner v. Stallibrass* (1898) 1 Q.B. 56 (injury to horse lent); *Pontifex v. Midland Rly. Co.*

5. No civil injury is to be classed as a tort if it is merely a breach of trust or a breach of some other merely equitable obligation. The reason of this exclusion is historical only. The law of torts is in its origin a part of the common law, as distinguished from equity, and it was unknown to the Court of Chancery. Wrongs, therefore, such as breach of trust, which fell exclusively within the jurisdiction of that

Tort and
breach of
trust.

(1877) 3 Q.B.D. 23 (wrongful delivery of goods by carrier to consignee after notice of stoppage *in transitu*); *Sachs v. Henderson* (1902) 1 K.B. 612 (wrongful removal of fixtures by landlord in interval between agreement for lease and actual demise); *Hayne v. Culliford* (1879) 4 C.P.D. 182 (injury to goods by negligence of carrier, whether contract of carriage made with owner of goods or not); *Meux v. Gt. E. Rly. Co.* (1895) 2 Q.B. 387 (the same); *Gladwell v. Steggall* (1839) 5 Bing. N.C. 733, 53 R.R. 257, and *Pippin v. Sheppard* (1822) 11 Price 400, 25 R.R. 746 (negligence of surgeon); *Langridge v. Levy* (1837) 2 M. & W. 519, 4 M. & W. 337, 46 R.R. 689 (personal injuries caused to plaintiff through fraud of defendant in selling a dangerous chattel to a third person); *Payne v. Rogers* (1794) 2 H.Bl. 350, 3 R.R. 415 (injury to passenger in highway caused by failure of landlord to fulfil his contract with tenant to keep the premises in repair).

³ *Fictitious concurrence of Tort and Contract.* The true boundary line between contract and tort is obscured by the recognition in the older law (a recognition which has not yet wholly ceased) of certain quasi-contracts, which are really mere torts, and of certain quasi-torts, which are in reality mere breaches of contract.

(a) *Quasi-contracts.* It was under the old practice, and indeed still is, permissible in certain cases to *waive* a tort and sue instead on a fictitious contract implied in law. Thus if A takes away and sells a chattel belonging to B, B instead of suing him in tort for the value of the chattel may sue him for the price so received by him on its sale, on a fictitious contract of agency. This doctrine of the waiver of torts will be considered by us more fully in a subsequent chapter.

(b) *Quasi-torts.* Since the abolition of forms of action fictitious or quasi-torts have ceased to perplex our modern law. They were the outcome of a perverted development of legal procedure, and have disappeared with the procedure to which they owed their origin. A knowledge that they once existed, however, is still essential if we would read with understanding the older authorities. The historical explanation of these fictitious torts which are in reality mere breaches of contract is to be found in the fact that the action of *assumpsit*, which was the general remedy for the breach of a simple contract, was in its origin a mere variety of the action of *case*, which was one of the most important remedies for a tort. Our law possessed originally no effective remedy for the breach of a simple contract. When the breach of such a contract was also a true tort, the delictal remedies of *trespass* and *case* were available; but when the wrong was

court stand outside the category of tort, and are governed, just as breach of contract is, by a body of special rules differing in sundry respects from those which have been developed by the common law of torts. And although at the present day the difference between equitable and common law jurisdiction has disappeared, it is still requisite to preserve the memory of it in defining the limits of the law of torts.

a mere breach of contract the rigour of the older law supplied no action save in exceptional cases. This defect was ultimately overcome by the device of suing in tort (in the action of *case*), even when there was no real tort at all but merely a breach of contract. In the result the action of *case*, when so perverted from its proper uses and employed as a contractual remedy, became differentiated into a distinct action, namely *assumpsit*. The improvement thus effected in the law was great, for it rendered possible for the first time the development of a comprehensive law of contract. But this benefit was not obtained without cost. It was based upon a fictitious identification of torts with breaches of contract, and until the last days of common law pleading the effects remained visible of this confusion and partial obliteration of the boundary line between the law of torts and the law of contracts. For notwithstanding the differentiation of the action of *assumpsit* it continued to be permissible in many cases to sue in the original delictal action of *case* for causes of action which were undoubtedly merely contractual. Until the abolition of forms of action, therefore, it remained impossible to draw any logical distinction between contract and tort which would have conformed to the established rules of procedure. At the present day we are at liberty to disregard these perversities of the old pleading and practice, and to draw in accordance with logical requirements the boundary line between contract and tort. For examples of such actions of tort for pure breaches of contract, see *Marzetti v. Williams* (1830) 1 B. & Ad. 415, 35 R.R. 329 (banker dishonouring customer's cheque); *Weall v. King* (1810) 12 East 452, 11 R.R. 445, and *Green v. Greenbank* (1816) 2 Marsh. 485, 17 R.R. 529 (breach of warranty on sale); *Burnett v. Lynch* (1826) 5 B. & C. 589, 29 R.R. 343 (breach of contract of indemnity). There are even judicial dicta which carry these and similar cases to their ultimate logical conclusion, namely the inclusion of the whole sphere of contract within that of tort. "Wherever there is a contract," says Lord Campbell in *Brown v. Boorman* (1844) 11 Cl. & F. p. 44, 65 R.R. p. 10, "and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover in tort or in contract." If this were indeed so, the whole distinction between tort and breach of contract would be reduced to a matter of the form of pleading. Fortunately for the rationality of our law the abolition of the old system of procedure has enabled us to get back to the substance of the matter, taking no further account of these anomalies of form.

6. Summing the matter up, we have seen that there are **Summary.**
four classes of wrongs which stand outside the sphere of tort :

- (a) Wrongs exclusively criminal.
- (b) Civil wrongs which create no right of action for damages, but give rise to some other form of civil remedy exclusively.
- (c) Civil wrongs which are exclusively breaches of contract.
- (d) Civil wrongs which are exclusively breaches of trust or of some other merely equitable obligation.

We may accordingly define a tort as *a civil wrong for which* **Tort defined.**
the remedy is an action for damages, and which is not exclusively
the breach of a contract or the breach of a trust or other merely
equitable obligation. ⁴

§ 2.—The General Conditions of Liability.

1. In general, though subject to important exceptions, **Two con-**
a tort consists in some act done by the defendant, whereby **ditions of**
he has wilfully or negligently caused some form of harm to **liability.**
the plaintiff. That is to say, liability for a tort is commonly
based on the co-existence of two conditions :—

- (a) Damage suffered by the plaintiff from the act of the defendant ;
- (b) Wrongful intent or culpable negligence on the part of the defendant.

2. *Damage.* The law of torts exists for the purpose of **Damage.**
preventing men from hurting one another, whether in respect
of their property, their persons, their reputations, or anything
else which is theirs. The fundamental principle of this branch
of the law is : *Alterum non laedere*—to hurt nobody by word
or deed. An action of tort, therefore, is usually a claim for
pecuniary compensation in respect of damage so suffered.

3. *Damnum sine injuria.* Nevertheless there are many **Damnum**
forms of harm of which the law takes no account. There **sine injuria.**

⁴ The terms *tort* and *wrong* were originally synonymous and co-extensive in application. *Tort* is derived from the Latin *tortum*, while *wrong* is in its origin identical with *wrung*, both the English and the Latin terms meaning primarily, therefore, conduct which is crooked or twisted, as opposed to that which is straight or right (*rectum*). *Tort*, however, has become specialised in its application, while *wrong* has remained generic.

are many acts which, though harmful, are not wrongful, and give no right of action to him who suffers their effects. Damage so done and suffered is called *damnum sine injuria*,¹ and the reasons for its permission by the law are various. In the first place the harm done to the individual may be more than counterbalanced by the benefit accruing to the public at large : as in the case of the loss inflicted on individual traders by competition in trade,² or certain forms of harm done to one's neighbour in the exercise of one's rights of property.³ Secondly the harm complained of may be too trivial, too indefinite, or too difficult of proof, for the legal suppression of it to be expedient or effective. Thus no action, it seems, will lie to recover damages for mere mental suffering unaccompanied by physical harm, though caused by the wilful act or the negligence of the defendant.⁴ "Mental pain or anxiety the law cannot value and does not pretend to redress."⁵ Thirdly, the harm done may be of such a nature that the law considers it inexpedient to confer any right of pecuniary redress upon the individuals injured, but provides some other remedy, such as a criminal prosecution, as exclusively appropriate. Such is the case, for example, with the harm which an individual suffers in common with the public at large by reason of the existence of a public nuisance.⁶

*Injuria sine
damno.*

4. *Injuria sine damno.* Just as there are cases in which damage is not actionable as a tort (*damnum sine injuria*), so conversely there are cases in which an act is actionable as a tort although it has been the cause of no damage at all (*injuria sine damno*). Torts are of two kinds, namely, those which are actionable *per se*, and those which are actionable only on proof of actual damage resulting from them. The

¹ The term *injuria* is here used in its original and proper sense of *wrong* (in *jus*, contrary to law). The modern use of injury as a synonym for damage is unfortunate but inveterate.

² *Mogul Steamship Co. v. McGregor Gow & Co.* (1892) A.C. 25.

³ *Mayor of Bradford v. Pickles* (1895) A.C. 587.

⁴ *Dulieu v. White* (1901) 2 K.B. at p. 673 per Kennedy, J. Similarly no *solatium* for wounded feelings is recoverable under the Fatal Accidents Act for the death of a relative. *Blake v. Midland Rly. Co.* (1852) 18 Q.B. 93.

⁵ *Lynch v. Knight* (1861) 9 H.L.C. at p. 598.

⁶ *Winterbottom v. Lord Derby* (1867) L.R. 2 Ex. 316.

law sometimes says to a defendant : You will be held liable if you do such and such an act. At other times it says merely : You will be held liable if in consequence of such and such an act damage is inflicted on the plaintiff. Thus the act of trespassing upon another's land is wrongful and actionable, even though it has done the plaintiff not the slightest harm. " By the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing."⁷ Similarly a libel is actionable *per se*, while slander on the other hand (that is to say, verbal as opposed to written defamation) is in most cases not actionable without proof of actual damage.

The explanation of these cases in which a right of action is conferred on a person who has sustained no harm is to be found in the fact that certain acts are so likely to result in harm that the law prohibits them absolutely and irrespective of the actual issue. We may say that in such cases the law conclusively presumes damage, because of the mischievous tendency of the act : whereas in other cases there is no presumption, and actual harm must be proved as a fact.

The distinction may be conveniently expressed by distinguishing all rights as being either absolute or qualified. An absolute right is one the violation of which is actionable *per se* ; a qualified right is one the violation of which gives rise in itself to no action, but is actionable only as being in the actual result an instrument of mischief. Thus the right not to be libelled is an absolute right, while the right not to be slandered is merely a qualified one.

5. *Mens rea*. The second condition usually demanded by *Mens rea*. the law for liability in an action of tort is the existence of either wrongful intention or culpable negligence on the part of the defendant. These two different mental attitudes of the defendant towards his act and its consequences may be classed together under the name of *mens rea*—a guilty mind—and a fundamental principle of delictal liability is expressed in the maxim, *Actus non facit reum, nisi mens sit rea*. The

⁷ *Entick v. Carrington* (1765), 19 St.Tr. 1066.

act itself creates no guilt in the absence of a guilty mind.⁸ The reason of this rule is that the ultimate purpose of the law in imposing liability on those who do harm to others is to prevent such harm by punishing the doer of it. He is punished by being compelled to make pecuniary compensation to the person injured. It is clear, however, that it is useless to punish any person either civilly or criminally, unless he acted with a guilty mind in the sense already explained. No one can be deterred by a threat of punishment from doing harm which he did not intend and which he did his best to avoid. All that the law can hope to effect by way of penal discipline is to make sure that men will not either wilfully or carelessly break the law and inflict injuries upon others.

Pecuniary compensation is not in itself the ultimate object or a sufficient justification of legal liability. It is simply the instrument by which the law fulfils its purpose of penal coercion. When one man does harm to another without any intent to do so and without any negligence, there is in general no reason why he should be compelled to make compensation to him. The damage done is not thereby in any degree diminished. It has been done, and cannot be undone. By compelling compensation the loss is merely shifted from the shoulders of one man to those of another, but it remains equally heavy. Reason demands that a loss shall lie where it falls, unless some good purpose is to be served by changing its incidence, and in general the only purpose so served is that of punishment for wrongful intent or negligence. There is no more reason why I should insure other persons against the harmful results of my own activities, in the absence of any *mens rea* on my part, than why I should insure them against the inevitable accidents which result to them from the forces of nature independent of human actions altogether.⁹

It commonly makes no difference in respect of the existence or measure of civil liability, whether the *mens rea* of

⁸ In its application to the *criminal* law, *mens rea* is used in a narrower sense to include wrongful intention only, this being commonly the only form of it which is sufficient to create criminal liability. In the law of torts, however, the term must be taken to include negligence also.

⁹ For a discussion of this matter see Holmes's *Common Law*, pp. 81-96; Pollock's *Torts*, 7th ed. pp. 132-146.

the defendant amounts to wrongful intent or merely to negligence. Whenever a man is liable for doing a certain kind of harm intentionally, he is in most cases equally liable if he does it negligently. This rule, however, as to the equivalence of the two forms of *mens rea* is subject to certain exceptions—cases in which wrongful intent is a ground of liability, but negligence is not. To take a single example, it is actionable to cause harm to a person by wilfully and fraudulently deceiving him, but it is not in general actionable to do similar harm by means of a merely negligent misrepresentation.¹⁰

§ 3.—Absolute Liability.

1. The rule that *mens rea* in one or other of its two forms—wrongful intent or negligence—is an essential condition of civil liability for a tort, is subject to important exceptions. These exceptional cases in which liability is independent of intention or negligence may be conveniently distinguished as cases of *absolute* liability. They may be explained and justified (except so far as they are merely the outcome of historical accident) as being based on a conclusive presumption of negligence—a presumption established by the law on the ground that to require actual proof of the necessary *mens rea* would in these particular instances impose too great a burden upon the plaintiff and unduly limit the efficiency and the certainty of the administration of justice. *Mens rea* not always required.

All cases of absolute liability may be divided into three classes :

- (a) Liability for inevitable accident.
- (b) Liability for inevitable mistake.
- (c) Vicarious liability for the wrongful acts of others.

2. *Inevitable accident.* Damage is said to be caused by inevitable accident, when it is not caused intentionally, and could not have been avoided by reasonable care on the part of him who caused it.¹ It need not have been inevitable in the stricter sense—that is to say, incapable of being prevented at all. If a man will carry firearms or drive a horse, his duty is merely to use reasonable care not to do harm to others. Inevitable accident usually a good defence.

¹⁰ *Derry v. Peek*. 14 A.C. 337.

¹ *The Marpesia* (1872) L.R. 4 Q.C. 212.

thereby ; and if notwithstanding the use of such care an accident happens, he may plead that it was due to inevitable accident ; and it will be no answer to this plea that by a greater degree of care he might have avoided the mischief, or that if he had altogether refrained from these dangerous forms of activity it would not have ensued.

That inevitable accident in this sense is commonly a good defence in an action of tort is merely an application of the general principle as to the requirement of *mens rea*. Notwithstanding this general principle, however, there are exceptional cases in which inevitable accident is not recognised as any ground of exemption—cases in which a man acts at his peril (*suo periculo*) and is made by law an insurer of others against the harmful results of his activities. What these cases are we shall consider in detail later. It is sufficient to mention here, as illustrations, damage done by the trespasses of cattle,² damage done by fire,³ damage done by wild animals,⁴ and damage done by the escape of water or other dangerous substances brought or kept by any one upon his land.^{5 6}

Inevitable
mistake
usually no
defence.

3. *Inevitable mistake*. Although inevitable accident is commonly a good defence against civil liability, inevitable *mistake* is commonly no defence at all. Any wilful interference with the property, person, reputation, liberty, or other right of another person on a supposed justification is done at the doer's peril, and if the justification does not in truth exist, a belief in its existence, however honest and reasonable, is no defence. It makes no difference in such a case whether the mistake is one of fact or one of law.

It is essential for this reason to distinguish carefully between accident and mistake. The plea of inevitable accident

² *Ellis v. Loftus Iron Co.* (1874) L.R. 10 C.P. 10.

³ *Black v. Christchurch Finance Co.* (1894) A.C. 48.

⁴ *Filburn v. People's Palace Co.* (1890) 25 Q.B.D. 258.

⁵ *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330.

⁶ It was at one time doubted whether the defence of inevitable accident was available at all in the case of damage for which the appropriate remedy was the old action of *trespass* (to person or property). But it is now settled that there is no distinction in this respect between trespass and other forms of delictal remedy. *Stanley v. Powell* (1891) 1 Q.B. 86 ; *Holmes v. Mather* (1875) L.R. 10 Ex. 261.

is that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and avoided by the exercise of reasonable care. The plea of inevitable mistake, on the other hand, is that although the act and its consequences were intended, the defendant acted under an erroneous belief, formed on reasonable grounds, that some circumstance existed which justified him. Such a mistaken belief in justification, however reasonable, is not itself a justification. This is probably the most important of all the exceptions recognised by law to the requirement of *mens rea* as a ground of civil liability. It must be regarded as having its reason in the evidential difficulties in which the law would find itself involved, if it consented to make any inquiry into the honesty and reasonableness of a mistaken belief which a defendant sets up as an excuse for his wrongful act.

Thus if a bailee without negligence loses a chattel entrusted to him, this is an *accident*, for which he is not liable;⁷ but if he redelivers the chattel to the wrong person, this is a *mistake*, for which, however honest and careful he may have been, he must answer in an action for conversion.⁸ So an auctioneer who sells and delivers goods as the agent of a customer who has no title to them is liable for their value to the true owner, even though he has already paid the proceeds of the sale to his own customer.⁹ "Persons deal with the property in chattels or exercise acts of ownership over them at their peril."¹⁰ Similarly he who enters upon the land of another is liable in trespass, even though he honestly and on reasonable grounds believed that the land was his own, or that he had a right of entry on it.¹¹ So although a defamatory statement is not actionable if it is true, a mistaken belief in its truth, on whatever grounds it may be based, is commonly no defence. He who attacks another's reputation does so at his own peril. So a sheriff who by mistake in the execution of a writ seizes

⁷ *Giblin v. McMullen* (1868) L.R. 2 P.C. 317; *Searle v. Laverick* (1874) 9 Q.B. 122.

⁸ *Hiori v. Bott* (1874) L.R. 9 Ex. 86.

⁹ *Consolidated Co. v. Curtis* (1892) 1 Q.B. 495.

¹⁰ *Fowler v. Hollins* (1872) L.R. 7 Q.B. at p. 639.

¹¹ *Basely v. Clarkson*, 3 Lev. 37.

the goods of the wrong person or arrests the wrong person is just as responsible in an action for damages, as if he had been guilty of a wilful wrong.¹²

Special cases
in which
mistake a
good defence.

4. To this general principle of absolute liability for mistake the law recognises a few exceptions of minor importance, there being certain cases in which it would work such hardship or interfere so seriously with the exercise of lawful activities that it is necessary to relax it. Thus, for example, the mistaken prosecution of an innocent man is not in itself an actionable wrong; for such a rule would effectually prevent the administration of the criminal law. A prosecutor incurs no liability unless he acted both maliciously and without reasonable cause.¹³ So the mistaken arrest of an innocent man on suspicion of felony is not actionable, if a felony has actually been committed, and if there is reasonable ground for believing that the person arrested is guilty of it.¹⁴ So although, as we have seen, a mistaken defamatory statement is actionable in ordinary cases, yet in those special cases which are said to be privileged, mistake creates no liability unless the statement is not merely erroneous but is also made maliciously from an improper motive.

Vicarious
liability.

5. *Vicarious liability.* The third and last form of absolute liability is that which may be distinguished as vicarious. In general a person is responsible only for his own acts, but there are exceptional cases in which the law imposes on him vicarious responsibility for the acts of others. The most important and far-reaching instance of this is the responsibility of a master for his servant. A master is liable for the torts of his servant provided that they are committed in the course of the servant's employment, even though they were not authorised by the master, and indeed even though they were expressly forbidden by him.¹⁵ Minor instances of vicarious liability are the responsibility of a husband for the torts of his wife,¹⁶ that of a partner for the torts of his partner

¹² *Glasspoole v. Young* (1829) 9 B. & C. 696, 33 R.R. 294.

¹³ *Elsee v. Smith* (1822) 1 Dowl. & Ry. 97, 24 R.R. 639.

¹⁴ *Beckwith v. Philby* (1827) 6 B. & C. 635, 30 R.R. 484.

¹⁵ *Limpus v. London General Omnibus Co.* (1862) 1 H. & C. 526.

¹⁶ *Earle v. Kingscote* (1900) 1 Ch. 203.

in and about the partnership business,¹⁷ and that of a corporation for the torts of its directors and other agents in the conduct of its affairs.¹⁸

§ 4.—Wrongful Intent and Malice.

1. The term malice, as used in law, is ambiguous and possesses two distinct meanings which require to be carefully distinguished. It signifies either (1) wilful and conscious wrongdoing, or (2) action determined by an improper motive. To act maliciously means sometimes to do the act intentionally, with knowledge that it is wrongful, while at other times it means to do the act from some wrong and improper motive, some motive of which the law disapproves. This motive need not be that of spite or ill-will; that is to say, it need not amount to malice in the narrow and popular sense of the term. Any motive is malicious in the legal sense which is not recognised by law as a sufficient and proper one for the act in question.

Ambiguity
of term
malice.

As an example of the use of malice in the first sense, *i.e.*, wilful and conscious wrongdoing, we may take the criminal law as to unlawful and malicious injuries to property.¹ To kill an animal unlawfully and maliciously means to kill it intentionally, knowing that the act is illegal. The term malicious refers here, not to the motive or reason of the act, but to the knowledge with which it is committed. A malicious wrong in this sense is opposed to a negligent wrong and to one committed under an honest though mistaken claim of right. "Malice," it has been said,² in reference to this class of cases "may be defined to be where any person wilfully does an act injurious to another without lawful excuse." It is to malice in this sense that the well known definition given by Bayley, J., in *Bromage v. Prosser*³ is exclusively applicable: "Malice in common acceptance means ill will

First sense of
the term.

¹⁷ *Hamlyn v. Houston* (1903) 1 K.B. 81.

¹⁸ *Citizens' Life Assurance Co. v. Brown* (1904) A.C. 423.

¹ 24 & 25 Vict. c. 97 §§ 40, 51, etc.

² *R. v. Pembliton* (1874) L.R. 2 C.C. at p. 122 *per* Blackburn, J.

³ (1825) 4 B. & C. at p. 255; 28 R.R. at p. 247.

against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."⁴

Second sense
of the term.

2. Clearly to be distinguished from this first sense of the term malice is the second sense, in which it signifies the existence of an improper motive. Thus malicious prosecution does not mean the intentional and consciously wrongful prosecution of an innocent man; it means a prosecution inspired by an improper motive—a motive which the law does not allow and sanction—for example, the extortion of money.⁵ A prosecution so inspired may be actionable even though there was an honest belief in the guilt of the accused. Similarly malicious defamation does not mean the intentional publication of a defamatory statement, but defamation which, even though honestly and on reasonable grounds believed to be true in fact and therefore justified in law, is inspired by an improper motive. Such a motive destroys the protection which the law affords to defamatory statements made on privileged occasions.⁶

Motive
commonly
irrelevant.

3. Save in exceptional cases, such as those just mentioned, malice in the sense of improper motive is entirely irrelevant in the law of torts. The law in general asks merely what the defendant has done, not why he did it. A good motive is no justification for an act otherwise illegal, and a bad motive does not make wrongful an act otherwise legal. The rule

⁴ Cf. Bowen L.J. in *Mogul Steamship Co. v. McGregor Gow & Co.* 23 Q.B.D. p. 612: "Maliciously means and implies an intention to do an act which is wrongful to the detriment of another." So Lord Watson in *Allen v. Flood* (1898) A.C. p. 94: "In order to constitute legal malice, the act done must be wrongful, . . . and the intentional doing of that wrongful act will make it a malicious wrong in the sense of law." It need only be added that wrongful intent and therefore malice in this sense extends in law to include not merely actual intent, but also that constructive intent which the law occasionally attributes to him who, though he does not in fact intend a mischief, acts with full knowledge of the danger and with reckless and conscious disregard of it. See on the whole matter *Miles v. Hutchings* (1903) 2 K.B. 714; *Daniel v. James* (1877) 2 C.P.D. 351; *Reg. v. Matthews* (1877) 14 Cox C.C. 5; *Reg. v. Pembrilton* (1874) L.R. 2 C.C. 119; *Reg. v. Child*, L.R. 1 C.C. 307.

⁵ *Mitchell v. Jenkins* (1833) 5 B. & Ad. p. 595, 39 R.R. p. 573.

⁶ "Acting maliciously means acting from a bad motive." *Per Parke, B., in Brook v. Rawl*, (1849) 19 L.J. Ex. p. 115.

is based partly on the danger of allowing such a tribunal as a jury to determine the liability of a defendant by reference to their own opinions and prejudices as to the propriety of his motives, and partly on the difficulty of ascertaining what these motives really were.

A leading case on this matter is *The Mayor of Bradford v. Pickles*,⁷ in which the defendant was held not liable for intentionally intercepting, by means of excavations on his own land, the underground water that would otherwise have flowed into the adjoining reservoir of the plaintiffs, although his sole motive in so doing was to coerce the plaintiffs to buy his land at his own price. It was already settled law that the interception of underground water is not an actionable wrong, even though done intentionally,⁸ but in the present case an attempt was made to establish an exception to this rule when the damage was caused not merely intentionally but maliciously. This contention however was rejected by the House of Lords. Lord Watson says: ⁹ "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious." Lord Macnaghten speaks to the same effect: ¹⁰ "In such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act apart from the motive gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element." The same principle was again formulated by the House of Lords in the later case of *Allen v. Flood*. Lord Watson there says: ¹¹ "Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. . . . The existence of a bad motive in the case of an act which is not in itself illegal will not convert that act into a civil wrong." ¹²

⁷ (1895) A.C. 587. ⁸ *Chasemore v. Richards* (1859) 7 H.L.C. 349.

⁹ (1895) A.C. p. 598.

¹⁰ *Ibid.*, p. 601.

¹¹ (1898) A.C. 1, at p. 92.

¹² See also the remarks of Lord Herschell at p. 118, and of Lord Macnaghten at p. 153. Lord Shand at p. 167 says: "The exercise by a person of a legal right does not become illegal because the motive of action is improper or malicious." Compare the German Civil Code,

Special cases
in which
motive is
relevant.

4. There are certain exceptions to the general principle that motive or malice is immaterial in the law of torts—exceptions which obtained firm establishment in the law before the general doctrine had received express recognition. The chief of these exceptional cases are the wrongs of defamation and malicious prosecution. An erroneous defamatory statement made on a privileged occasion is excused by the law if it is made honestly and from a proper motive, but otherwise it is subjected to the ordinary rule of absolute liability for mistake. Similarly the mistaken prosecution of an innocent person on insufficient grounds is excused by the law if it was inspired by proper motives, but the existence of malice destroys this protection and subjects the prosecutor to the ordinary principle that he who makes a mistake must pay for it.

§ 5.—Negligence.

Negligence
and wrongful
intent dis-
tinguished.

1. Negligence is the breach of a legal duty to take care. It is carelessness in a matter in which carefulness is made obligatory by law. Negligence and wrongful intent are the two alternative forms of *mens rea*, one or other of which is commonly required by law as a condition of liability. Each consists in a certain mental attitude of the defendant towards the consequences of his act. He intends those consequences when he foresees and desires them, and therefore does the act in order that they may happen. He is guilty of negligence, on the other hand, when he does not desire the consequences, and does not act in order to produce them, but is nevertheless indifferent or careless whether they happen or not, and therefore does not refrain from the act notwithstanding the risk that they may happen. The careless man is he who does not care—who is not anxious or not sufficiently anxious that his activities shall not be the cause of loss to others. The wilful wrongdoer is he who desires to do harm; the negligent wrongdoer is he who does not sufficiently desire to avoid doing it. Negligence and wrongful intent are

sec. 226: "The exercise of a right is not allowable when its sole object is to injure another person." The particular application made of the general principle to the facts in *Allen v. Flood* is a matter which will call for detailed consideration in another connection.

inconsistent and mutually exclusive states of mind. He who causes a result intentionally can not also have caused it negligently, and *vice versa*.¹

2. Negligence is usually accompanied by inadvertence, but it is not the same thing, and this coincidence is not invariable. Carelessness as to possible consequences very often results in a failure to bring those consequences to mind, *i.e.*, inadvertence. Commonly, therefore, the careless person not only does not intend the consequence, but does not even advert to it; its possibility or probability does not occur to his mind. But this is not always so, for there is such a thing as wilful, *i.e.*, conscious and advertent negligence. The wrongdoer may not desire or intend the consequence, but may yet be perfectly conscious of the risk of it. He does not intentionally cause the harm, but he intentionally and consciously exposes others to the risk of it. He who throws a stone over a wall into the street, and so hurts a passenger, may have been perfectly conscious of the danger which he was thus causing, and yet so careless of others' rights and interests, that he was content to risk the happening of an accident. But whether he did or did not advert to the danger, he was guilty merely of negligence, and not of wilful harm. There is no wilful harm, unless he not merely adverted to the possible consequence, but did the act in order that that consequence should happen.

3. The term negligence is used to denote not merely the mental attitude that has been described, but also conduct produced by such a mental attitude. In other words, negligence means either subjectively a careless state of mind, or objectively careless conduct—just as cruelty, for example,

¹ Negligence is defined by Willes, J., in *Grill v. General Iron Screw Collier Co.* (1866) L.R. 1 C.P. p. 612, as "the absence of such care as it was the duty of the defendant to use." "Actionable negligence," says Brett, M.R., in *Heaven v. Pender* (1883) 11 Q.B.D. 503 at p. 507, "consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his own part, has suffered injury to his person or property." "Fraud imports design and purpose; negligence imports that you are acting carelessly and without that design." *Kettlewell v. Watson* (1882) 21 Ch. D. at p. 706, *per* Fry, J.

denotes either a subjective disposition or objective conduct produced by such a disposition. This double use causes no difficulty or confusion, for negligence in the one sense is necessarily accompanied by negligence in the other also; and it is a matter of indifference whether in any case we use the term subjectively or objectively. Negligence in the subjective sense is opposed to wrongful intent; negligence in the objective sense is opposed to intentional wrongdoing.

It is negligence in its objective sense that is referred to in the well known definition of Alderson, B., in *Blyth v. Birmingham Waterworks Co.*² "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Negligence, that is to say, is conduct different from that of a prudent and reasonable man; therefore it is imprudent and unreasonable conduct, viz., conduct unaccompanied by that anxious consideration of consequences which is called care.

The
objective
theory of
negligence

4. Attempts are sometimes made to define negligence as a purely objective fact involving no characteristic or essential mental attitude at all. Negligence, it is said, is a failure to take care, and to take care means to take precautions against harm. Or putting the same argument in another way, negligence is unreasonable and imprudent conduct, and whether conduct deserves these epithets is a purely objective question depending in no way on the state of mind of the actor. This, however, is a defective analysis of the conception. To cause harm by a failure to take precautions is not necessarily want of care or negligence, for it may be either intentional wrongdoing or a mere accident. Which of these three things it is, cannot be ascertained save by looking into the mind of the defendant in order to see what his mental attitude was towards the act and its consequences. To mix poison in food and leave it where it will probably be eaten by some one who thereby comes to his death, is not necessarily a negligent act, for the result may have been intended, or it may have been a mere accident due to ignorance that the substance was

² (1850) 11 Ex. 781 at p. 784.

poisonous. How can we tell whether it was wilful, negligent, or accidental, save by reference to the mental attitude of the doer? So also with the suggestion that negligence is unreasonable conduct, and therefore a purely objective fact. There is no purely objective test of reasonableness. No man can be judged in this respect, save by reference to what he knew, or foresaw, or would have known or foreseen had he been in his own heart sufficiently careful and anxious to do no harm to others.

The plausibility of the objective theory of negligence comes from the fact that in respect of civil liability it is commonly a matter of indifference whether the defendant acted wilfully or merely negligently. He is equally liable in each case, therefore there is no need to distinguish between these two forms of *mens rea*, or to enquire whether in fact the defendant did or did not intend the consequences of his act. So soon, however, as the distinction between intention and negligence does become material in law, it becomes clear at the same time that each of them is essentially a subjective fact. For example, criminal liability usually depends on wrongful intent, as distinguished from negligence; so also do certain forms of civil liability, such as that which arises from misrepresentation.³

5. *The duty of care.*⁴ There is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff himself and not merely to others. "The ideas of negligence and duty are strictly correlative," says Bowen, L.J.,⁵ "and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound to exercise towards somebody." This duty of carefulness is not universal; it does not extend to all occasions, and all persons, and all modes of activity. There are cases in which, although there is a duty not to cause harm intentionally, there is no

The duty of care.

³ For a statement of the objective theory of negligence, see Sir F. Pollock's *Law of Torts*, pp. 428-430, 7th ed.

⁴ In the language of lawyers a synonym of *care* is *diligence*, a reminiscence of the Latin opposition between *diligentia* and *negligentia*. This, however, is an archaism of legal diction; in popular speech diligence is the opposite not of negligence but of idleness.

⁵ *Thomas v. Quartermaine* (1887) 18 Q.B.D. p. 694.

corresponding duty to take care not to cause it accidentally. Thus I must not deceive another to his own hurt by wilfully telling him lies, but I am commonly under no obligation to take care that the statements which I make to him are true. So a man may be under a duty of care towards one person, and yet in the same matter and on the same occasion under no duty of care towards another. The occupier of premises is bound towards persons lawfully entering on them to take care that they are free from danger, but he owes no such duty to a trespasser.

When a duty
of care exists.

A consideration of the rules which determine the existence or absence of a duty of care in particular cases pertains to the detailed exposition of the law, and therefore to a later part of our inquiry, and not to such a discussion of the general principles of liability as we are at present concerned with. We shall consider in later chapters, for example, what duty of care (if any) is imposed upon the owners or occupiers of dangerous premises, upon the owners or possessors of dangerous chattels, upon persons who make representations upon which other persons are intended to act, upon persons who issue defamatory statements, upon persons putting the criminal law in motion against others, upon persons keeping dangerous animals, and so forth. In the present connection, however, there is one question as to this matter which may be appropriately considered: Is the duty of taking care one which is general in its scope, existing in all cases save those in which the law for special reasons establishes an exemption from it; or on the contrary is it the general rule that no duty of care exists, save when the law sees fit to establish it in special cases? On this question there is no adequate authority,⁶ but on principle it is submitted that the first of these alternatives is correct, and that whenever any form of damage is of such a nature as to be actionable when done intentionally, it is also actionable when done negligently, save when an exemption from such liability is specially established by law. Such exemptions are no doubt numerous and important, but it would seem clear that they are exceptions and not the general rule. It will be understood, of course, that this general duty of care exists only in the case

⁶ See *Heaven v. Pender* (1883) 11 Q.B.D. 503.

of positive acts. Liability for a mere nonfeasance—a mere passive failure to concern oneself with the safety of others—does not exist, except when created in special instances by exceptional rules of law. He who ventures on dangerous activities is bound, save in special cases, to take care that he does no harm thereby; but in respect of a mere nonfeasance every man is entitled in law, save in special cases, to say that he is not his brother's keeper.

6. *Negligence and want of skill.* It is commonly said that want of skill amounts to negligence.⁷ *Imperitia culpa adnumeratur*,⁸ said the Romans. This is true in the sense that it is commonly a negligent act voluntarily to undertake the doing of any act which can be safely done only through the possession of special skill, unless the doer possesses or believes on reasonable grounds that he possesses the requisite skill. The negligence does not in reality consist in the lack of skill, but in undertaking the work without skill. No one is bound by law to be a skilful and competent driver of horses, but every one is bound not to drive horses until and unless he is skilful and competent in that regard.

Negligence
and want of
skill.

The same principle applies to the lack of any other qualification for the safe conduct of an operation, such as knowledge, sound judgment, sound health, physical strength, or the possession of any other requisite mental or bodily faculty. No man is to blame because fate has denied him good sense, or a retentive memory, or a quick apprehension, or sound eyesight; these are in themselves mere misfortunes for which he is no more accountable in law than in justice; but if, lacking those things, and having reasonable means of knowing that he lacks them, he enters on activities which demand the possession of them, he is guilty of negligence and liable for damage so resulting.

If, however, a person thus deficient in some attribute of the ordinary and average man is placed without his own choice in some situation where the possession of that attribute is requisite for the avoidance of harm, he is not responsible as for negligence, merely because the ordinary man could

⁷ *Heaven v. Pender* (1883) 11 Q.B.D. p. 507 *per* Brett, M.R.

⁸ D. 50, 17, 132.

have avoided the accident. He must be judged with reference to his own capacities of mind and body, and if he does his best, he does enough, even though a man better endowed would have been bound to do much more. A blind man must not voluntarily do an act which can be safely done only by those who have eyes to see, but if he has such action thrust upon him through no choice of his, he will not be judged as though he could see.⁹

§ 6.—The Standard of Care.

Greatest

possible care
not required.

1. The standard of due care in all cases in which a duty of care exists is the care which would be taken in the same circumstances by an ordinarily careful man.¹ The law does not require the highest degree of care of which human nature is capable. It does not require a man to refrain from an act merely because a certain amount of danger is caused by it. It does not insist that men shall so anxiously consider the interests of their fellows as never to expose them to any risk of harm however small. To drive horses down a crowded street is not in itself a negligent act, although accidents constantly happen from such a cause. Nor is the use of fire arms in itself an omission to use due care, though men are frequently injured thereby. The risk of harm is so small in such cases, that the law allows the danger to be knowingly created. To lay down any other rule would unreasonably restrict the beneficent activities of mankind for the sake of avoiding a remote and unlikely evil. When, therefore, a defendant is held liable for negligence, it is not because he could by some conceivable degree of care have avoided the accident, but because he could have avoided it by reasonable care.

Reasonable
care.

2. The test of what is reasonable is the conduct of the average man in like circumstances, and with like knowledge and means of knowledge. No man is bound by law to attain a higher standard of care than that which is represented by the ordinary practice of mankind in such a matter. Con-

⁹ Cf. Pollock, Torts, p. 28, 7th ed.

¹ *Vaughan v. Menlove* (1837) 3 Bing. N.C. 468, 43 R.R. 711: "We ought to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

versely no one will be held justified, if he shows a lesser degree than this, even though he honestly believes that he has shown as much as reason and justice require of him. It is not the belief and judgment of the defendant that determines the due standard of diligence, but the belief and judgment of the man of average prudence and reasonableness. The question in every case is not whether the defendant thought his conduct sufficiently careful and reasonable, but whether the jury thinks so.²

3. The law does not recognise different standards of care or different degrees of negligence in different classes of cases. The sole standard is the care that would be shown in the circumstances by an ordinarily careful man, and the sole form of negligence is a failure to use this amount of care. It is true, indeed, that this amount will be different in different cases, for a reasonable man will not show the same anxious care when handling an umbrella as when handling a loaded gun. But this is a different thing from recognising different legal standards of care; the test of negligence is the same in all cases.³

² *Vaughan v. Menlove* (1837) 3 Bing. N.C. 468, 43 R.R. 711.

³ Nevertheless in the case of *Coggs v. Bernard* (1704) 1 Sm. L.C. 173, 2 Ld. Ray. 909, an unfortunate attempt was made to introduce into English law the misunderstandings of the Roman law of negligence that were then received among the civilians, and the distinctions then suggested have been repeated from time to time in various judicial dicta and numerous text-books. According to this doctrine there are three different kinds or degrees of negligence, ordinary, gross, and slight. "Ordinary neglect," it is said in Chitty on Contracts, p. 367, 14th ed., "has been defined to be the omission of that care which every man of common prudence and capable of governing a family takes of his own concerns; gross neglect to be the want of that care which every man of common sense, how inattentive soever, takes of his own property; and slight neglect to be the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods." There are no authorities which compel us to admit that distinctions so vague and impracticable in their nature, so unfounded in principle, and so clearly rooted in historical error as to the rules of Roman law, form any genuine part of the law of England. In *Wilson v. Brett* (1843) 11 M. & W. p. 115, Rolfe B. observed that he "could see no difference between negligence and gross negligence, that it was the same thing with the addition of a vituperative epithet," and this observation has been approved by Willes, J. in *Grill v. Iron Screw Collier Co.* (1866) L.R. 1 C.P. p. 612. In *Hinton v. Dibbin*

Different degrees of negligence not recognised.

§ 7.—The Proof of Negligence.

Burden of proving negligence.

1. The burden of proving negligence is on the plaintiff who alleges it. When accidental harm is done, it is not for the doer to excuse himself by proving that the accident was inevitable and due to no negligence on his part; it is for the person who suffers the harm to prove affirmatively that it was due to the negligence of him who caused it.¹

There must be reasonable evidence of negligence for a jury.

2. Unless the plaintiff produces reasonable evidence that the accident was caused by the defendant's negligence, there is no case to go to the jury, and it is the duty of the judge to enter judgment for the defendant. Here, as elsewhere, the term reasonable evidence means such evidence as a reasonable jury might deem sufficient for proof. The preliminary question for the judge is this: Is the evidence produced on behalf of the plaintiff (including the admissions of the defendant) of such weight that reasonable men (in the absence of, or leaving out of account any evidence produced by the defendant to the contrary) might come to the conclusion that the accident was caused by the defendant's negligence? If so, the case must go to the jury; if not, judgment must be given for the defendant without the case being submitted to the jury at all.

In thus withdrawing the case from the jury the judge does not substitute his own opinion as to the proof of negligence for their opinion; he decides, not that negligence has not been proved, but that no reasonable man or jury could think that it had been proved. The judge may be of opinion

(1842) 2 Q.B. p. 661, Lord Denman says: "It may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists," and in *Austin v. Manchester etc. Rly. Co.* (1850) 10 C.B. p. 474 the remark is quoted by Cresswell, J. with approval. See also Pollock on Torts, p. 432, 7th ed. To the contrary effect, see *Giblin v. McMullen* (1868) L.R. 2 P.C. p. 336 *per* Lord Chelmsford, and Beven on Negligence, Vol. 1, Ch. 2.

¹ *Cotton v. Wood* (1860) 8 C.B. N.S. at p. 571 *per* Erle, C.J.: "The plaintiff is not entitled to succeed unless there be affirmative proof of negligence on the part of the defendant. . . . Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of proper care on the one side or on the other, the party who founds his claim upon the imputation of negligence fails to establish his case."

that there was no negligence, and yet be bound to leave the question to the jury, because it is one on which reasonable men might reasonably differ.

3. It is to be noticed that this question of reasonable evidence is to be decided not by weighing the evidence of the plaintiff against that of the defendant, but by disregarding altogether the evidence of the defendant, and by asking whether that of the plaintiff is, *per se* and apart from any contradiction, sufficient or insufficient to bring conviction to a reasonable mind. The task of weighing the evidence on one side against that on the other belongs exclusively to the jury, and the only control exercised over them is the power of the court to order a new trial when the verdict is against the weight of evidence. Thus in *Dublin Railway Co. v. Slattery*² a widow sued for the death of her husband who had been run over by a train passing through a railway station. The only evidence of negligence was the testimony of three witnesses (friends of the deceased) who swore that they did not hear any whistle from the approaching train. As against this, ten witnesses swore that they heard the train whistling, and the question was left to the jury who found for the plaintiff. It was held by the House of Lords that the case was rightly left to the jury, there being reasonable evidence of negligence, and therefore that the verdict must stand. There was no doubt that, taking all the evidence for and against into account, the verdict was a perverse and dishonest one, but in the circumstances of the particular case, and as the law then stood, it was not open to the defendant to ask for a new trial on the ground that the verdict was against the weight of evidence, and the only possible contention on the part of the defendant was that there was no evidence on which the issue should have been left to the jury.³ Illustrative cases.

4. The case of *Metropolitan Rly. Co. v. Jackson*⁴ is in reality a decision on remoteness of damage and not on evidence of

² (1878) 3 A.C. 1155.

³ The Court of Appeal has now power to order a new trial in such a case on the ground that the verdict is against the weight of evidence, *Metropolitan Rly. Co. v. Wright*, 11 A.C. 152; or even to enter judgment for the defendant instead of granting a new trial, *Allcock v. Hall* (1891) 1 Q.B. 444.

⁴ (1877) 3 A.C. 193.

negligence, and will be dealt with later under that head. The two questions are, however, closely connected—indeed in their ultimate analysis identical—and the judgment of Lord Cairns in this case is a classical authority on the present matter:⁵ “The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether from these facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice, that these separate functions should be maintained, and should be maintained distinct. . . . It would . . . place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever.” “It has always,” says Lord Blackburn in the same case,⁶ “been considered a question of law to be determined by the judge, subject of course to review, whether there is evidence which, if it is believed, and the counter-evidence, if any, not believed, would establish the facts in controversy. It is for the jury to say whether and how far the evidence is to be believed.”⁸

5. In *Wakelin v. London and S.W. Rly. Co.*⁷ the dead body of the plaintiff's husband was found lying on the railway line at a level crossing, having been run over by a train which carried a head-light but did not whistle as it approached the crossing. No evidence was produced as to how the deceased came to be on the line. It was held by the House of Lords that there was no case to go to a jury; that even assuming that there was sufficient evidence of negligence (*viz.* the failure to whistle), there was no evidence that this was the cause of the accident. With this case may be compared *Smith v. South Eastern Rly. Co.*,⁸ in which the facts were practically the same, except that the gatekeeper whose duty and custom it was to signal with a light to trains approaching the crossing, neglected to do so, and the deceased, believing that no train was approaching, attempted to cross the line and met his

⁵ *Ibid.*, p. 197.

⁷ (1886) 12 A.C. 41.

⁶ *Ibid.*, p. 207.

⁸ (1896) 1 Q.B. 178.

death. It was held by the Court of Appeal that there was evidence of negligence to go to a jury, because the neglect of the gatekeeper might possibly have caused the accident by misleading the accused. In *Manzoni v. Douglas*,⁹ following *Hammack v. White*,¹⁰ it was held by the Court of Appeal that the mere fact that a horse ridden or driven by the defendant became unmanageable and ran away with him, so causing injury to the plaintiff, was not sufficient evidence of negligence to go to a jury. In *Crafter v. Metropolitan Rly. Co.*,¹¹ it was held by the Court of Common Pleas that the fact of a passenger slipping on the brass edging of the steps leading down to the platform of the defendants' railway station was no evidence that the company was guilty of negligence in having its premises unsafe for passengers. In *Cotton v. Wood*,¹² the plaintiff's wife crossed in front of the defendant's omnibus, but immediately ran back again, because startled by another carriage, and she was then run over by the omnibus. The driver of the omnibus had seen her pass the first time, and then turned round to speak to the conductor, and therefore did not see her return. It was held that there was no evidence of negligence to go to a jury. The driver had no reason to anticipate or guard against the immediate return of a foot passenger who had already safely crossed in front of the horses.¹³

§ 8.—*Res ipsa loquitur*.

1. The rule that it is for the plaintiff to prove negligence, *Res ipsa loquitur*, and not for the defendant to disprove it, is in some cases one of considerable hardship to the plaintiff; because it may be that the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident, but he cannot prove how it happened, so as to show its origin in the negligence of the defendant. This hardship is avoided to a considerable extent by the rule of *Res ipsa loquitur*. There are many cases in which the accident speaks for itself, so that it is sufficient for the plaintiff

⁹ (1880) 6 Q.B.D. 145.

¹⁰ (1862) 11 C.B. (N.S.) 588.

¹¹ (1868) L.R. 1 C.P. 300.

¹² (1860) 8 C.B. (N.S.) 568.

¹³ See also *McDowall v. G. W. Rly. Co.* (1903) 2 K.B. 331; *Drury v. N.E. Ry. Co.* (1901) 2 K.B. 322.

to prove the accident and nothing more. He is then entitled to have the case submitted to the jury, and it is for the defendant, if he can, to persuade the jury that the accident arose through no negligence of his.

This maxim *Res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant, that a reasonable jury could find without further evidence that it was so caused. "There must be reasonable evidence of negligence;" it is said in *Scott v. London Docks Co.*,¹ "but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

There is not, indeed, even in these cases any *legal presumption* of negligence, so that the legal burden of disproving it lies on the defendant. But the plaintiff by proving the accident has adduced reasonable evidence, on which the jurors may, if they think fit, find a verdict for him.

Illustrations. 2. Thus in *Byrne v. Boadle*² a barrel of flour rolled out of an open doorway on the upper floor of the defendant's warehouse, and fell upon the plaintiff, a passenger in the street below. It was held that this was sufficient evidence of negligence to go to a jury, without any evidence as to the manner in which the accident happened. For barrels, if properly handled, do not commonly behave in this fashion; and the improbability of such an accident happening without negligence was sufficient to justify a jury in finding that negligence was the cause of it. The same principle has been applied in cases in which merchandise, being lowered in a crane, has slipped out of its fastenings and fallen upon the plaintiff;³ in which a brick has fallen from a railway viaduct upon a passenger in the highway below;⁴ in which a collision has occurred between two trains belonging to the same company;⁵

¹ (1865) 3 H. & C. at p. 601.

² (1863) 2 H. & C. 722.

³ *Scott v. London Docks Co.* (1865) 3 H. & C. 596.

⁴ *Kearney v. London, Brighton etc. Rly. Co.* (1871) L.R. 6 Q.B. 759.

⁵ *Shinner v. L.B. & S.C. Rly. Co.* (1850) 5 Ex. 787.

in which the door of a railway carriage flies open on being pressed from within ;⁶ in which a packing case leaning against a wall has fallen over from some unexplained reason and injured a passer-by.⁷ ⁸

§ 9—Contributory Negligence.

1. It often happens that harm is suffered by a plaintiff, not solely through the negligence of the defendant, but also through that of the plaintiff himself. If he had used due care for his own safety, he would have come to no harm, notwithstanding the negligence of the defendant. In such a case the plaintiff is said to be guilty of contributory negligence and is in general debarred from any action. For it is commonly the duty of every man to look after himself, and for injuries which he could have avoided by the use of care he will seek redress from the law in vain.

Thus in *Butterfield v. Forrester*¹ the defendant wrongfully obstructed a street by placing a pole across it, and the plaintiff rode along the street in the evening, when it was getting dusk, but while there was still sufficient light to notice the obstruction, and coming into collision with the pole he was thrown from his horse and injured. It was held that he had no cause of action, as he could, notwithstanding the defendant's negligence, have avoided the accident by the use of due care. Lord Ellenborough says : " One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an

⁶ *Gee v. Metropolitan Rly. Co.* (1873) L.R. 8 Q.B. 161.

⁷ *Briggs v. Oliver* (1866) 4 H. & C. 403.

⁸ In *Welfare v. London & Brighton Rly. Co.* L.R. 4 Q.B. 693, the plaintiff was held rightly nonsuited when he proved merely that he was lawfully in the defendants' railway station, and that a roll of zinc, which was being used in repairing the roof, fell through a hole in the roof and injured him. For in this case there was no proof that the person who caused the mischief was a servant of the company, for whose negligence the company could be held liable, and the nature of his employment was such that he could not be presumed to be their servant.

¹ (1809) 11 East 60 ; 10 R.R. 433. For other examples see *Flower v. Adam* (1810) 2 Taunt. 314, 11 R.R. 591 ; *Shelton v. L. & N.W. Rly. Co.* (1867) L.R. 2 C.P. 631.

obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

Rational basis of the rule discussed.

2. The rational basis of this rule of contributory negligence has been the subject of much debate. Attempts have sometimes been made to exhibit it as merely a special application of the rule as to remoteness of damage.² An accident which would not have resulted from the defendant's negligence had not the plaintiff been negligent also, is, it is said, too remote to be actionable; for every man has a right to assume that others will use due care for their own preservation. Thus Bowen, L.J., in *Thomas v. Quartermaine*³ says of the doctrine of contributory negligence that "it rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury." This explanation, however, can not be regarded as sufficient, for it leads necessarily to the inconsistent conclusion that the same accident may be at the same time too remote and not too remote a result of the defendant's negligence. Thus if the plaintiff drives a conveyance and has a friend with him at the time, and he and his friend are both injured by a collision which happens through the combined negligence of the plaintiff and the defendant, the plaintiff has no cause of action against the defendant, but his friend has. Yet if the damage to the plaintiff was too remote to be actionable, how can the damage to his friend be any less remote? So also if the conveyance is damaged by the collision, the question whether the defendant is liable for this depends on whether the conveyance belongs to the plaintiff or is merely hired by him; but what bearing has this distinction on the question of remoteness? So if the defendant negligently collides with the conveyance in which the plaintiff is being driven, and the negligence of the driver of that conveyance contributed to the accident, the liability of the defendant depends on whether that driver was or was not the servant of the plain-

² As to this, see *infra*, § 37.

³ (1887) 18 Q.B.D. at p. 697.

tiff. But how can this fact, unknown to the defendant at the time of the accident, determine in any way the remoteness of the damage ?

The truth of the matter seems to be that the rule of contributory negligence is explainable only as a special application of the general principle : *In pari delicto potior est conditio defendentis*. When both parties are equally to blame, neither can hold the other liable. It is expedient that men should be induced to take care of themselves, instead of trusting to the vigilance of others ; and to secure this end the law deprives them of any remedy for accidents which they might have avoided by due care. From motives of public policy the law refuses to help those who might have helped themselves. *Vigilantibus non dormientibus jura subveniunt*. " The plaintiff," says Lord Halsbury in *Wakelin v. London and S.W. Rly. Co.*,⁴ " may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence, the plaintiff fails, because *In pari delicto potior est conditio defendentis*." Whether this explanation of the rule is a sufficient justification of it is a question which we shall consider later.

3. The rule of contributory negligence determines not merely the liability of the defendant for a negligent wrong, but also his liability for the unintended consequences of an intentional wrong. It must not be supposed that in all cases in which a defendant is entitled to plead the contributory negligence of the plaintiff he is himself guilty merely of negligence. He may be guilty of wilful wrongdoing, provided only that the consequence for which the plaintiff seeks to hold him liable was an unintended one. Thus in the case already cited of *Butterfield v. Forrester*⁵ the defendant who successfully pleaded contributory negligence was sued for wilfully obstructing the public highway. It is the legal duty of every man to use due care for his own preservation, not merely against the negligence of other persons, but also against the unintended results of other persons' wilful wrongdoing. But as to intended consequences the defence of contributory negligence is irrelevant.

Rule extends to unintended consequences of wilful wrongs.

⁴ (1886) 12 A.C. at p. 45. ⁵ (1809) 11 East 60 ; 10 R.R. 433.

Plaintiff
must be under
a legal
duty of care.

4. The mere fact that by care the plaintiff might have avoided the accident is no defence, if under the circumstances of the case his failure to use that care did not amount to culpable negligence, *i.e.*, the breach of a legal duty to use care for his own safety. Thus in many instances the plaintiff has a right to assume that there is no danger, and is under no duty to take any care to ascertain whether any exists. He is not bound to anticipate and provide for the possible negligence of the defendant, but is entitled to take it for granted that the defendant has done all things rightly and carefully. If an accident happens in such a case, the defendant will not be heard to say that the plaintiff might have avoided it by care, because no such care was obligatory on him. Thus in *Gee v. Metropolitan Rly. Co.*⁶ the plaintiff was a passenger on the defendants' railway, and leaned against the door of the carriage with the intention of looking out of the window. The door had been negligently left unfastened by the defendants' servants, and the plaintiff fell out of the train. It was held that the defendants were liable; for although the plaintiff could easily have avoided the accident by the simple precaution of examining the door-handle, he was not bound to take that precaution, but was entitled to rely on the carefulness of the defendants. So also if the defendant keeps a coal plate or the covering of a cellar-opening in the pavement, the plaintiff is entitled to step upon it in reliance on the due fulfilment of the defendant's duty to keep it securely fastened, and is not bound to ascertain whether it is safe.⁷ So also if the plaintiff has been misled by the defendant's express or implied representation that there is no danger.

Moreover in these cases in which the plaintiff is perplexed or agitated by being exposed to danger by the wrongful act of the defendant, it is sufficient if he shows as much judgment and self-control in attempting to avoid that danger as may be reasonably expected of him in such circumstances.⁸

⁶ (1873) L.R. 8 Q.B. 161.

⁷ See *Gwinnell v. Eamer* (1875) L.R. 10 C.P. 658.

⁸ *Bridges v. North London Rly. Co.* (1874) L.R. 7 H.L. 213; *N.E. Rly. Co. v. Wanless*, L.R. 7 H.L. 12.

⁹ *The Bywell Castle* (1879) 4 P.D. 219; *The Tasmania* (1890) 15 A.C. at p. 226 *per* Lord Herschell.

5. When the plaintiff is a child or other person under some form of personal incapacity, it is sufficient if he shows as much care as a person of that kind may reasonably be expected to show; and he will not lose his remedy, merely because a person of full capacity might by using greater care or skill have avoided the accident. This rule is sometimes expressed in the form that the contributory negligence of a child is no defence. But this is much too absolute a statement. The question in each case is simply whether, having regard to the age of the plaintiff, his conduct amounted to culpable negligence or not.

Contributory negligence of children.

Thus in *Lynch v. Nurdin*¹⁰ the defendant negligently left his horse and cart unattended in the street, and the plaintiff, aged seven, climbed into it, while another boy made the horse move on, and so caused the plaintiff to fall out and suffer injuries. It was held that the defendant was liable. So in *Harrold v. Watney*¹¹ the defendant occupied land adjoining the highway and surrounded by a fence which was rotten and dangerous, and therefore a nuisance to the highway. The plaintiff, a boy aged four, climbed upon the fence in order to look over it, and the fence fell with him and injured him, and he was held to have a good cause of action against the defendant.¹²

§ 10.—The Rule in *Davies v. Mann*.

1. We have now to consider a very important qualification of the general principle that the contributory negligence of the plaintiff is a good defence. This qualification may be conveniently termed the rule in *Davies v. Mann*,¹ this being the first case in which it was recognised. The facts of the case were that the plaintiff negligently left his donkey with its legs tied in the highway, and the defendant subsequently came past in his waggon and negligently ran over the donkey. It was held that the defendant was liable—notwithstanding

Davies v. Mann.

¹⁰ (1841) 1 Q.B. 29; 55 R.R. 191.

¹¹ (1898) 2 Q.B. 320.

¹² The cases of *Hughes v. Macfie* (1863) 2 H. & C. 744, and *Mangan v. Atterton* (1866) L.R. 1 Ex. 239, must, it seems, be taken to have been in principle wrongly decided. See *Clark v. Chambers* (1878) 3 Q.B.D. pp. 333 and 339.

¹ (1842) 10 M. & W. 546; 62 R.R. 698.

the fact that the accident would not have happened but for the contributory negligence of the plaintiff—on the ground that the defendant had a sufficient opportunity of avoiding by the use of reasonable care the danger so created by the plaintiff's negligence. "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."²

Radley's
case.

The rule in *Davies v. Mann* was approved and applied by the House of Lords in *Radley v. London & N.W. Rly. Co.*³ The plaintiffs negligently left upon a siding of the defendants' railway a number of trucks, one of which contained another disabled truck. The joint height of these two trucks exceeded that of a bridge which crossed the siding and which was the property of the plaintiffs. The plaintiffs knew that the defendants would shortly deliver more trucks upon the siding, which might drive the loaded truck against the bridge and damage it; and this result actually happened. The engine driver of the defendants felt the resistance of the loaded truck pressing against the bridge, but instead of going to see what the cause was, he forced the train forward and broke down the bridge. It was held that the defendants were liable for the accident, notwithstanding the prior and contributory negligence of the plaintiffs.

Defective
formulation
of the rule.

2. The usual mode of formulating the rule in *Davies v. Mann* is to say that the defendant is liable if he could, notwithstanding the contributory negligence of the plaintiff, have avoided the accident by the use of reasonable care. "Though the plaintiff," says Lord Penzance,⁴ "may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him." This mode of state-

² 10 M. & W. p. 549.

³ (1876) 1 A.C. 754. See also *Tuff v. Warman* (1858) 5 C.B. (N.S.) 573. ⁴ *Radley v. London & N.W. Rly. Co.* (1876) 1 A.C. at p. 759.

ment, however, is clearly elliptical and insufficient as a complete formulation of the principle. Read literally it is not merely a limitation of the general rule as to contributory negligence, but the complete negation of it. For *ex hypothesi* in all cases of contributory negligence the defendant has been guilty of negligence which caused the accident ; therefore in all cases he could by the exercise of care have avoided the accident ; and therefore (reading the above proposition literally) he is liable notwithstanding the contributory negligence of the plaintiff.⁵ Clearly, therefore, something more than a mere opportunity of avoiding the accident by reasonable care is required in order to bring the rule in *Davies v. Mann* into operation. It is not easy, however, to state either on principle or authority precisely what this additional element is.

3. Subject to certain qualifications it would seem that the true test is the existence of the *last* opportunity of avoiding the accident ; that when an accident happens through the combined negligence of plaintiff and defendant, the defendant is liable if, but only if, he had a later opportunity than the plaintiff of avoiding it by reasonable care. Thus Sir Frederick Pollock says of the plaintiff in such cases that " he is not to lose his remedy merely because he has been negligent at some stage of the business, though without that negligence the subsequent events might not or would not have happened ; but only if he has been negligent in the final stage and at the decisive point of the event, so that the mischief, as and when it happens, is immediately due to his own want of care, and not to the defendant's."⁶

The true test: Last opportunity.

If this is so, there are three classes of cases to be distinguished :

(a) The opportunities of the plaintiff and defendant may have been coincident in time : as when two persons driving in opposite directions in the middle of a road at night and without lights come into collision with each other. In such a case there is no liability on either side. An action by either may be met by a plea of contributory negligence.⁷

⁵ See the remarks of Butt, J., in *The Vera Cruz* (1884) 9 P.D. p. 93.

⁶ *The Law of Torts*, p. 450, 7th ed.

⁷ See *The Bernina* (1887) 12 P.D. at p. 88 *per* Lindley, L.J.

(b) The opportunity of the plaintiff may be later than that of the defendant. In this case also there is no liability : as in *Butterfield v. Forrester*⁸ itself, where the negligence of the plaintiff in riding against the obstruction was later in date than the negligence of the defendant in placing it there.

(c) The opportunity of the defendant may be later than that of the plaintiff. In this case the general rule of contributory negligence is excluded by the rule in *Davies v. Mann*. The negligence of the plaintiff in leaving his donkey in the road was prior to the negligence of the defendant in driving over it, and therefore was no bar to the action. So in *Radley's case*⁹ the last opportunity of avoiding the accident was with the defendants, and they were held liable accordingly.

Distinction
between direct
and indirect cause.

4. This being so, the rule of contributory negligence is frequently and correctly expressed by drawing a distinction between the *direct* and the *indirect* cause of the accident. The contributory negligence of the plaintiff is a defence if it is a direct cause of the accident ; but it is no defence if it is merely an indirect cause, the negligence of the defendant being the direct cause. An indirect cause means a cause more remote in time than the negligence of the other party.¹⁰

Necessity of
knowledge or
means of
knowledge of
danger.

5. This principle, however, that the liability of the parties depends on the relative dates of their opportunities of avoiding the mischief, is subject to an important qualification. The fact that the last opportunity was with the defendant will not make him liable, unless at that time he either knew or ought to have known of the danger created by the prior negligence of the plaintiff. He is not to blame for failing to avoid that danger, unless he knew or had the means of knowing of its existence. To bring the rule in *Davies v. Mann* into operation it must be shown that the defendant either

⁸ (1809) 11 East 60 ; 10 R.R. 433.

⁹ (1876) 1 A.C. 754.

¹⁰ *Tuff v. Warman* (1857) 2 C.B. (N.S.) 740. *The Bernina* (1887) 12 P.D. at p. 61 *per* Lord Esher. Sometimes the term *proximate* cause is substituted for *direct* cause (*The Bernina*, 12 P.D. at p. 88 *per* Lindley, L.J.), but this is objectionable because the same term is used in a different sense in connection with the rule of remoteness of damage. Sir Frederick Pollock suggests the term *decisive* cause. Torts, p. 455, 7th ed.

knew, or would have known had he acted throughout with reasonable care, of the plaintiff's negligence in time to avoid the results of it.

(a) *Actual knowledge.* Where the defendant actually knows of the danger in time to avoid it and has the last opportunity of doing so, he is clearly liable. This is *Davies v. Mann* itself, if we assume that the defendant actually saw the donkey in time to avoid driving over it.

(b) *Means of knowledge.* It is settled, however, by *Radley's case*¹¹ that actual knowledge is not essential, and that it is enough if the defendant ought to have known of the danger in time to avoid it: *i.e.*, if he had the means of knowledge, and would have had actual knowledge had he acted throughout the whole business with due and reasonable care. In *Radley's case* the defendants' engine driver would have discovered the obstruction which did the mischief, if he had driven his engine upon the siding with proper caution.

(c) *No knowledge or means of knowledge.* Where, however, the defendant had no actual knowledge of the danger, and his ignorance of it was not due to his own negligence, he is not debarred from a plea of contributory negligence merely because he had a later opportunity of avoiding the mischief than the plaintiff had. There is, indeed, no authority on this point, but it is submitted that it is sound in principle. If the defendant in *Davies v. Mann*, instead of driving his waggon over the plaintiff's donkey, had left his waggon unattended in the road, and the horse had moved on and run over the donkey, it is submitted that the defendant would not have been liable, even though his act in leaving the waggon was later than the act of the plaintiff in leaving his donkey, and although the defendant, therefore, had the last opportunity of avoiding the mischief. So if the plaintiff himself had been lying drunk and asleep in the road, and the defendant being drunk and asleep had fallen out of his waggon, which thereupon ran over the plaintiff, can it be supposed that the liability of the defendant is to be determined by asking whether he or the plaintiff got drunk first? Clearly they are *in pari delicto*, and there is no action. So if the

¹¹ (1876) 1 A.C. 754.

defendant, lying drunk and asleep in his waggon, has run over the plaintiff drunk and asleep in the road, there is, it is submitted, no liability, even if the defendant remained awake and sober later than the plaintiff, so that the last opportunity was the defendant's. So if the defendant, lying drunk and asleep in his waggon, runs over the plaintiff's donkey, there is presumably no liability. It is true that if he had remained awake, he would have seen the donkey, but being asleep he had no power to avoid the accident at the time when that knowledge ought to have been acquired. There was no point of time at which the defendant had *both* the power of avoiding the danger and also knowledge or means of knowledge that the danger existed. If the defendant is to be held liable because he ought to have remained awake and then would have seen the donkey, it may be alleged with equal force that the plaintiff should be barred of his action because he ought to have remained with his donkey and then would have seen the waggon.

Rule in *Davies v. Mann* formulated.

6. Accepting the foregoing conclusions the rule in *Davies v. Mann* may be formulated thus: The contributory negligence of the plaintiff is no defence if the defendant had a later opportunity than the plaintiff of avoiding the accident by reasonable care, and at that time either knew or ought to have known of the danger caused by the plaintiff's negligence.

General statement of the law of contributory negligence.

7. Combining this rule with the general principle of contributory negligence we reach the following result: *When an accident happens through the combined negligence of two persons, he alone is liable to the other, who had the last opportunity of avoiding the accident by reasonable care, and who then knew or then ought to have known of the danger caused by the other's negligence.*

A possible qualification.

8. It is possible, although there is no authority on the point, that the rule in *Davies v. Mann*, as so interpreted, is not the only limitation to be imposed on the general proposition that the contributory negligence of the plaintiff is a good defence. It seems acceptable in principle to hold that if the defendant *alone actually knows* of the danger created by the plaintiff's negligence, and if he takes no reasonable care to avoid it, he is liable to the plaintiff, even though the last

opportunity of avoiding the accident was with the plaintiff himself. Thus if the driver of an electric tramcar actually sees a foot passenger standing on the track and evidently unconscious of danger, and gives him no warning, but runs him down, it would seem right that the tramway company should be held liable notwithstanding the contributory negligence of the plaintiff. Yet it is the plaintiff in such a case who has the last opportunity of avoiding the accident, since it is possible for him to step off the track at the last moment when it is already too late for the driver to stop the car. The defendants by their actual knowledge of the danger should be precluded from pleading that the accident was due to the contributory negligence of the plaintiff.

§ 11.—Contributory Negligence of Plaintiff's Servants and Agents.

1. The contributory negligence of a servant of the plaintiff is a good defence, in the same cases and to the same extent as that of the plaintiff himself, whenever the plaintiff would have been responsible for that negligence of his servant had harm ensued from it. In other words, the rule that the negligence of a servant in the course of his employment is imputed to his master, is applicable when the master is a plaintiff, no less than when he is a defendant. Contributory negligence of plaintiff's servants.

2. Presumably the same principle applies to other forms of vicarious liability, such as that of a husband for the negligence of his wife. "Individuals," says Lord Watson, "who are injured without being personally negligent, are nevertheless disabled from recovering damages, if at the time they stood in such a relation to any one of the actual wrongdoers as to imply their responsibility for his act or default."¹

3. The contributory negligence of an independent contractor or other agent of the plaintiff for whom he is not responsible, on the other hand, is no bar to the plaintiff's action. If a cab hired by the plaintiff comes into collision with another vehicle by the negligence of both drivers, and the plaintiff is hurt, he can recover damages not only from his own driver but also from the other. It was for some time, Contributory negligence of independent contractors.

¹ *The Bernina* (1888) 13 A.C. at p. 16.

indeed, believed on the authority of *Thorogood v. Bryan*² that this was not so, and that the negligence of the driver of a vehicle was imputed by law to the passenger in such sort that the passenger lost his remedy against third persons. This unreasonable doctrine was overruled by the House of Lords in *The Bernina*.³

§ 12.—The Burden of Proof of Contributory Negligence.

Burden of proof on defendant.

1. The burden of proving the contributory negligence of the plaintiff lies upon the defendant. It is not for the plaintiff to prove as part of his own case that he used due care, but for the defendant to prove that the plaintiff did not. And this is so, notwithstanding the fact that under the old system of pleading the defence of contributory negligence was raised not by a special plea, but under the general issue.¹

Power of judge to withdraw case from jury on issue of contributory negligence.

2. May a judge give judgment for the defendant without leaving any issue to the jury, on the ground that the plaintiff's own evidence shows that he is guilty of contributory negligence? This is a question that has been the subject of

² (1849) 8 C.B. 115.

³ (1888) 13 A.C. 1. In *Waite v. North Eastern Rly. Co.* (1858) E.B. & E. 719, it was held that a child was disentitled to sue for personal injuries caused by the negligence of a railway company, because of the contributory negligence of the adult in whose charge the child was at the time of the accident, both child and adult being passengers on the defendants' railway. This case was not expressly overruled by *The Bernina*, and was even referred to by Lords Watson and Herschell without express disapproval. It is submitted, however, that Lord Bramwell's opinion is correct, viz., that this case is indistinguishable from *Thorogood v. Bryan* and must fall along with it. The distinctions drawn by the Court of Appeal in *The Bernina* must be read in the light of the fact that that court had no power to overrule *Waite's Case*, which was a decision of the Exchequer Chamber. If the decision in *Waite's Case* is based on the contention that the company contracted with the adult to accept the child as a passenger only on condition that due care should be taken of it by the adult, the answer is that A cannot obtain by contract with B a right to do negligent harm to C.

¹ See *Wakelin v. L. & S.W. Rly. Co.* (1886) 12 A.C. at p. 47 per Lord Watson, adopting the opinion expressed on this point by Lord Hatherley and Lord Penzance in *Dublin etc. Rly. Co. v. Slattery* (1878) 3 A.C. pp. 1169, 1180. To the contrary effect see *Davey v. L. & S.W. Rly. Co.* (1883) 12 Q.B.D. p. 71 per Brett. M.R.

much difference of judicial opinion. It has been maintained on the one side that the question of contributory negligence is necessarily one which must be submitted to the jury in all cases; that a judge may withdraw the case from the jury because he holds that there is no reasonable evidence of the defendant's negligence, but cannot withdraw it because he holds that there is conclusive evidence of the plaintiff's; and that the only remedy for a perverse verdict for the plaintiff in such cases is an application for a new trial. The better opinion, however, would seem to be that if on the plaintiff's own case the evidence of contributory negligence is such that no reasonable jury could find a verdict for him, there is no case to go to a jury, and judgment must be given for the defendant.²

§ 13.—Contributory Negligence and Collisions at Sea.

1. The foregoing rules as to contributory negligence are subject to important modifications in their application to collisions at sea. The law as to liability for such collisions

Admiralty
rule of di-
vision of loss.

² The question was elaborately discussed by the House of Lords in *Dublin etc. Rly. Co. v. Slattery* (1878) 3 A.C. 1155, and although on the facts it was held that the case could not have been withdrawn from the jury, a majority of the Lords expressed the opinion that this could have been done had the evidence of the plaintiff's own negligence adduced in his own case been conclusive. Thus Lord Coleridge says (p. 1195): "It is, I think, the duty of the judge to withdraw the case from the jury if by the plaintiff's own evidence at the end of the plaintiff's case, or by the unanswered and undisputed evidence on both sides at the end of the whole case, it is proved either that there was no negligence of the defendants which caused the injury, or that there was negligence of the plaintiff which did." Similar opinions were expressed by Lords Cairns, Hatherley, Selborne, and Blackburn; *contra* Lords Penzance and O'Hagan. In the later case of *Wahelin v. London & S.W. Rly. Co.* (1886) 12 A.C. 41, Lord Watson and Lord Fitzgerald adopted the opinion of the majority in *Slattery's case*. In the case of *Skelton v. London & N.W. Rly. Co.* (1867) L.R. 2 C.P. 631, the rule was acted on by the Court of Common Pleas. So also in *Davey v. London & S.W. Rly. Co.*, 12 Q.B.D. 70, in the Court of Appeal. This latter case, however, must be taken to have been wrongly decided. The facts as to contributory negligence are practically indistinguishable from those in *Slattery's case*, in which it was held by the House of Lords that the case was one for the jury. "Davey's case," says Manisty, J. in *Brown v. Great W. Rly. Co.* (1885), 52 L.T. 622, "can no longer be considered as a binding authority."

is, however, too special in its nature to admit suitably of full treatment in a general discussion of the law of torts. It is here sufficient and necessary to state merely the fundamental principles of the matter, so as to indicate the points in which the maritime law of negligence differs from the common law which we have already considered.¹

2. The general rule of maritime law is that when a collision between two ships is caused by the fault of both of them, each is liable for half the damage suffered by the other : that is to say, the one that is less damaged is liable for half the difference between its own loss and that of the other.

In *The Milan*² Dr. Lushington lays down the rule as follows : " By the law of the admiralty, as it is called, if the owner of one ship brings an action against the owner of another ship for damage done by collision, and both ships have been to blame, the party proceeding recovers only a moiety of his damage ; if there is a cross action the damages are divided and each party recovers half his own loss."

3. The reason for this rule is that since both parties are in fault, both should suffer ; and to this end the damages should be apportioned between them ; and since it is not deemed practicable to apportion it on any estimate of the relative degrees of culpability, it must be divided equally between them. This rule is probably a nearer approximation to ideal justice than the rule of the common law, which in such a case deprives both parties of any remedy at all, and allows the loss to lie where it falls. By the admiralty rule no one can cause loss to another by negligence without having to pay for it ; neither can he suffer loss by his own negligence without having to pay for it. He has to make good half of the loss which he has brought upon the other, and he has to bear half the loss which he has brought upon himself. But by the common law a defendant may by his negligence cause serious damage to the plaintiff, and may suffer none himself, and may yet go free because of some contributory negligence

¹ For a full account of the matter see Marsden's *Law of Collisions at Sea*, 5th ed., 1904.

² (1861) Lush. 388 at p. 398.

on the part of the unfortunate plaintiff, who has done harm to no one but himself.³

4. Before the Judicature Act, 1873, the admiralty rule applied only in the courts of admiralty; a collision case in the courts of common law was governed by the ordinary common law of contributory negligence. By the Act mentioned this conflict of law was abolished, and it was provided that the admiralty rule should apply in all courts "in any cause or proceeding for damages arising out of a collision between two ships."⁴

Admiralty rule applies in courts of common law.

5. The admiralty rule of half damages does not apply to claims under the Fatal Accidents Act for death caused by collisions at sea. Such claims are governed by the common law of contributory negligence.⁵

Not to claims under Fatal Accidents Act.

6. Notwithstanding the general principle of division of loss, the rule in *Davies v. Mann* applies to collisions at sea no less than to collisions on land. The admiralty rule that the loss is divided when both ships are to blame applies only when the circumstances are such that at common law neither party could recover anything from the other. *Davies v. Mann* excludes the admiralty rule that the loss is to be divided, just as it excludes the common law rule that the loss is to lie where it falls.

Does not exclude the rule in *Davies v. Mann*.

Thus in *The Sans Pareil*⁶ a sailing ship, the East Lothian, being towed down the Channel at night, met the Channel fleet consisting of thirty vessels proceeding in four parallel lines. The ship improperly in breach of the rules of good seamanship attempted to cross in front of the squadron, and was run down and sunk by the battleship *Sans Pareil*. The navigating officer of the *Sans Pareil* saw the lights of the tug, but negligently failed to notice those of the ship, and after porting his helm so as to pass clear of the tug, starboarded and ran into the ship. Both vessels were therefore to blame; yet it was held by the Court of Appeal that the owner of the East Lothian was entitled to full damages, and not merely to half; for notwithstanding the prior fault of that vessel in

³ See the criticism of the common law rule by Lindley, L.J., in *The Bernina*, 12 P.D. p. 88. ⁴ Judicature Act, 1873, § 25, s-s. 9.

⁵ *The Bernina* (1888) 13 A.C. 1.

⁶ (1900) P. 267.

attempting to cross the line, the *Sans Pareil* had a clear subsequent opportunity (which the *East Lothian* then had not) of avoiding the collision. The fault of the battleship was therefore the direct, and that of the *East Lothian* merely the indirect cause of the accident.^{7 8}

§ 14.—*Volenti non fit injuria.*

Consent as
excluding
civil liability.

1. No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it. *Volenti non fit injuria.* No man can enforce a right which he has voluntarily waived or abandoned. This maxim has a double application. It applies, in the first place, to intentional acts which would otherwise be tortious: consent, for example, to an entry on land, which would otherwise be a trespass, or consent to physical harm, which would otherwise be an assault as in the case of a boxing match or a surgical operation. The maxim applies, in the second place, to consent to run the risk of accidental harm, which would otherwise be actionable as due to the negligence of him who caused it. Consent in this case is the agreement of the plaintiff, express or implied, to exempt the defendant from the duty of care which he other-

⁷ See also *The Margaret* (1884) 9 A.C. 873, and *The Monte Rosa* (1893) P. 23.

⁸ *Breach of the Collision Regulations.* The foregoing rules as to liability for collisions at sea are subject to an important qualification introduced by the Merchant Shipping Act 1894. By section 419 (4) of this act it is provided that: "Where in a case of collision it is proved to the court before whom the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary."

The term collision regulations includes the Regulations for the Preventions of Collisions at Sea made under the authority of section 418 of the Merchant Shipping Act 1894, and all other regulations to which the provisions of section 419 of that act have in any way become applicable. The infringement of other regulations, to which section 419 is not applicable, raises no such statutory presumption of blame, but is merely evidence of negligence. *The Monte Rosa* (1893) P. 23; *The Sans Pareil* (1900) P. 267; *The Margaret*, (1884) 9 A.C. 873; Marsden on Collisions, p. 53, 5th ed.

The effect of this somewhat vaguely worded statutory provision, as interpreted by judicial decisions, is that when a ship in collision

wise would have owed. Thus a master is under a legal duty to his servant to take care that the premises, plant, and machinery are reasonably safe ; but the servant may expressly or impliedly agree to exempt his master from this obligation in whole or in part, and to take the risk upon himself.¹

2. Certain acts which are offences against the criminal law do not cease to be criminal, merely because of the consent of him to whom they are done. Thus no person can lawfully consent to his own death, so that killing a man in a duel is murder. Nor can any one lawfully consent to grievous bodily harm, save for some reasonable purpose : for example, a proper surgical operation.² It has never been decided whether consent in such cases is a good defence in a civil action, but it is submitted that on principle it ought to be. If two men injure each other in a prize fight, they may be prosecuted criminally ; but it is difficult to suppose that either of them has a good cause of action against the other.³

Consent
as excluding
criminal lia-
bility.

3. Mere knowledge of an impending wrongful act, or of has been guilty of any infringement of the collision regulations which might possibly have contributed to cause the collision, there is a conclusive statutory presumption that that ship was guilty of negligence which directly caused the collision. This presumption of blame, being conclusive, excludes all evidence on the following points :

Knowledge
distinguished
from consent.

(a) That the infringement was not in fact an act of negligence. *The Khedive* (1880) 5 A.C. 876.

(b) That the collision was not in fact caused by the infringement. *The Fanny M. Carvill* (1875) 13 A.C. 455 n.

(c) That the circumstances are such as to bring the rule in *Davies v. Mann* into operation in favour of the ship so infringing the Regulations. This ship, therefore, is always liable for at least half the damage done by her, and can in no case recover more than half the damage suffered by her. *The Khedive*, 5 A.C. at p. 893 ; Marsden on Collisions, p. 21, 5th ed. The cases in which the rule in *Davies v. Mann* has been applied in admiralty are all cases in which the fault of the ship claiming the benefit of it has consisted merely in a breach of the rules of good seamanship or in a breach of some regulation to which section 419 of the Merchant Shipping Act is not applicable. *The Monte Rosa* (1893) P. 23 ; *The Sans Pareil* (1900) P. 267. *The Margaret*, (1884) 9 A.C. 873.

¹ *Smith v. Baker* (1891) A.C. 325 ; *Yarmouth v. France* (1887) 19 Q.B.D. 647.

² See *Reg v. Coney* (1882) 8 Q.B.D. 534.

³ See, however, Pollock's Torts, p. 157, 7th ed. Cf. the observations of Hawkins, J., in *Reg. v. Coney*, 8 Q.B.D. p. 553.

the existence of a wrongfully caused danger, does not in itself amount to consent, even though no attempt is made by the plaintiff to prevent or avoid that act or danger. Consent involves an express or implied agreement that the act may be rightfully done or the danger rightfully caused. The maxim of the law is *Volenti non fit injuria*, not *Scienti non fit injuria*.⁴ Thus in *Duke of Brunswick v. Harmer*⁵ the plaintiff successfully sued for libel, although the only publication was the sale of a copy of the libellous paper to a person whom the plaintiff himself had instructed to buy it for the very purpose of enabling an action to be brought. Similarly the occupier of land is not precluded from suing for a nuisance on the adjoining property by the fact that he well knew, when he went there, that the nuisance already existed.⁶

Knowledge
as evidence
of consent.

4. The same principle applies to the other branch of the maxim *Volenti non fit injuria*, relating to the consent to run the risk of accidental harm. A servant who knowingly works on dangerous premises or with defective plant or tools is not for that reason *ipso facto* debarred from suing his employer when an accident happens. The question is not whether he knew of the danger, but whether in fact he agreed to run the risk, in the sense that he exempted his employer from his duty not to create the danger, and agreed to take the chance of an accident. Knowledge of the danger may be evidence of such an agreement, but it is nothing more. This principle was finally established by the House of Lords in the leading case of *Smith v. Baker*.⁷ The plaintiff was employed in the defendants' stone quarry, and had worked there for months with full knowledge of the fact that he was exposed to danger by reason of the negligent practice of the defendants in swinging stones over the quarrymen's heads by means of a crane. The plaintiff having been injured by the fall of a stone, it was held that he was not, by reason of his knowledge of the danger and his acquiescence in it, *ipso facto* deprived of an action against the defendants, but that such knowledge and acquiescence was merely evidence for a jury on the question

Smith v.
Baker.

⁴ *Per* Bowen, L.J. *Thomas v. Quartermaine* (1887) 18 Q.B.D. p. 696.

⁵ (1849) 14 Q.B. 185, 80 R.R. 241.

⁶ *Elliotson v. Feetham* (1835) 2 Bing. N.C. 134; 42 R.R. 557.

⁷ (1891) A.C. 325.

whether he had agreed with the defendants to take the risk of such an accident upon himself. A similar decision had previously been given by the Court of Appeal in *Yarmouth v. France*,⁸ where the plaintiff, a carter in the defendant's service, had notwithstanding his remonstrances been required by the defendant's foreman to drive a horse which, to the knowledge of both, was so vicious as to be unfit for the purpose. The same conclusion was reached in the later case of *Williams v. Birmingham Battery Co.*,⁹ in which a workman met his death by falling from a scaffolding which he knew to be unsafe, and which he had nevertheless used for some time without remonstrance.¹⁰

5. Knowledge of the danger, even if it does not prove an agreement to take the risk within the rule in *Smith v. Baker*, may nevertheless be a bar to the plaintiff's action for two other reasons : Other effects of knowledge.

- (a) It may negative the existence of any negligence on the part of the defendant in causing that danger ;
- (b) It may establish the existence of contributory negligence on the part of the plaintiff.

In the first place, there are certain cases in which he who causes a danger fulfils all his legal duty of care by giving notice of that danger to the persons whom it affects. Thus he who lends a chattel gratuitously to another is not bound to do anything more than disclose the existence of any dangerous quality of which he actually knows and of which the borrower does not know.¹¹ In all such cases, therefore, it is an absolute defence, that the plaintiff had actual knowledge of the danger which caused his injury. *Scienti non fit injuria*.

⁸ (1887) 19 Q.B.D. 647.

⁹ (1899) 2 Q.B. 338.

¹⁰ See also *Clarke v. Holmes* (1862) 7 H. & N. 937. The case of *Thomas v. Quartermaine* (1887) 18 Q.B.D. 685, must, since *Smith v. Baker*, be taken to have been wrongly decided. For in that case the Court of Appeal decided for themselves as a matter of law that the plaintiff (who was scalded by falling into a vat which to his knowledge was left unguarded) was deprived of any cause of action because *volenti non fit injuria*. Since *Smith v. Baker* this is a question of fact for the jury, not of law for the judge. See the disapproval of *Thomas v. Quartermaine* expressed in *Smith v. Baker* by Lord Herschell (1891) A.C. p. 365.

¹¹ *Coughlin v. Gillison* (1899) 1 Q.B. 145.

In the second place there are cases in which the act of the plaintiff in knowingly running a risk created by the defendant's wrongful act amounts to contributory negligence on his own part, and is so a bar to any action. Whether it does so or not depends on whether the conduct of the plaintiff was reasonable, having regard to the magnitude of the risk and the urgency of the occasion. A certain amount of risk I am entitled to face, even with full knowledge, rather than to submit to be deprived of my liberty of action by the wrongful act of another, and if an accident happens, I can hold him accountable who wrongfully created the danger. But if the danger is so great that it is a foolhardy and unreasonable act to expose myself to it, I do so at my own cost. In *Clayards v. Dethick*¹² the plaintiff, a cab driver, occupied certain stables, and the defendant wrongfully dug a trench along the passage which afforded the only outlet from the stables to the street. The plaintiff attempted to lead out two of his horses along the passage and over the heaps of soil which the defendant had excavated, and while doing so one of the horses fell into the trench and was injured. It was held that the defendant was liable; for the plaintiff was not bound to submit to be thus deprived of the use of his stables and was entitled knowingly to face the danger thus created, and to cast all responsibility for the issue upon the wrongdoer. "The whole question was whether the danger was so obvious that the plaintiff could not with common prudence make the attempt."¹³

It is clear that no risk, however great, can be made the ground of a charge of contributory negligence if the defendant himself requested or ordered or consented to the act of the plaintiff in running that risk. It may have been a foolhardy act of the plaintiff in *Yarmouth v. France*¹⁴ to drive the horse that did the mischief, but this defence was not open to the defendant.

Summary.

6. The maxim *Volenti non fit injuria* is in its strict and proper application limited to the case of an express or im-

¹² (1848) 12 Q.B. 439, 76 R.R. 305.

¹³ 12 Q.B. p. 446. See also *Jones v. Boyce* (1816) 1 Stark. 493, 18 R.R. 812; *Robson v. N.E. Rly. Co.* (1875) L.R. 10 Q.B. 271; *Rose v. N.E. Rly. Co.* (1876) 2 Ex. D. 248. ¹⁴ 19 Q.B.D. 647.

plied *agreement* to suffer harm or to run the risk of it. In a wider and less accurate sense, however, it is also used to include the operation of mere *knowledge* in excluding an action in accordance with the principles already mentioned. So that in this wide sense we may say that the maxim covers three distinct classes of cases :

- (a) Those in which the plaintiff has agreed expressly or impliedly to suffer harm or to run the risk of it.
- (b) Those in which, because the plaintiff knows of the danger, the defendant has done no wrong in causing it.
- (c) Those in which, because the plaintiff knows of the danger, his act in voluntarily exposing himself to it is an act of contributory negligence, and so deprives him of an action.

CHAPTER II.

PARTIES.

§ 15.—The Crown.

The Crown
not liable for
torts.

There is no remedy against the Crown for a tort. For any violation by the Crown of the rights of subjects the appropriate remedy, if there is one at all, is not an action, but a petition of right. This remedy, however, is limited in its scope, and is not available in cases of tort. The Crown cannot be charged with negligence, fraud, or other forms of tortious wrongdoing, nor is it responsible for the acts of its agents and servants.¹ This rule is subject to the following qualifications :

(a) A petition of right will lie against the Crown for the recovery of damages for a breach of contract ; and not the less so, it is presumed, because that breach of contract is also a tort.²

(b) A petition of right will lie against the Crown for the specific restitution of property wrongfully detained in the possession of the Crown ; or for the value of such property, when the Crown has had the benefit of it and specific restitution is impossible. " The only cases," it has been said,³ " in which the petition of right is open to the subject are where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money ; or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service."

¹ *Tobin v. The Queen* (1864) 16 C.B. (N.S.) 310 ; *Feather v. The Queen* (1865) 6 B. & S. 257.

² *Thomas v. The Queen* (1874) L.R. 10 Q.B. 31 ; *Windsor Rly. Co. v. The Queen*, 11 A.C. 607.

³ *Feather v. The Queen* (1865) 6 B. & S. p. 294.

§ 16.—Public Officials.

1. The irresponsibility of the Crown does not extend to its agents and servants. Every such agent or servant is personally responsible for all torts committed by him, and it is no defence that the act complained of was done by him in his public capacity, or in the name and on behalf of the Crown, or by the express command or authority of the supreme executive. "The civil irresponsibility of the supreme power for tortious acts," it has been said by the Privy Council,¹ "could not be maintained with any show of justice, if its agents were not personally responsible for them."

2. The rule of employers' liability, however, is not applicable to public officials, so as to make them responsible for the acts of other public officials who are subordinate to them. Thus the Secretary of State for War cannot be sued in tort for the negligence of some subordinate official of the War Office; for the relation between him and his subordinate is not that of master and servant; they are fellow servants of the Crown. It is otherwise, indeed, if an actual authority to commit the tort is given by the superior to his inferior; but it is not enough that the inferior was acting within the general scope of his employment, as in the ordinary case of master and servant.²

3. The mere fact that persons are entrusted by law with public functions does not in itself make them public servants, so as to exempt them from liability for the acts of their subordinates. Thus in *Mersey Docks Trustees v. Gibbs*³ the defendant corporation was held liable for the negligence of its servants notwithstanding the fact that it had been established by statute for public purposes exclusively. It was a public body, but not a servant of the Crown or a department of the executive government; therefore its subordinates were in its own service and not in the service of the Crown. Similarly municipal corporations, district councils, and other bodies corporate

¹ *Rogers v. Rajendro Dutt* (1860) 13 Moore P.C. at p. 236. See also *Musgrave v. Pulido* (1879) 5 A.C. 102.

² *Raleigh v. Goschen* (1898) 1 Ch. 73.

³ (1864) L.R. 1 H.L. 93. See also *Gilbert v. Trinity House* (1881) 17 Q.B.D. 795.

established for the purposes of local government are responsible for their servants; for they are not themselves the servants of the Crown.⁴

Aliens and
Acts of State.

4. The rule that the authority of the Crown is no defence to a public official in an action of tort does not apply when the plaintiff is an alien not resident in British dominions. No such alien can complain in an English court of any act done by the authority, precedent or subsequent, of the English Crown. To British subjects the English courts will grant redress even against the agents of the government; but those who owe no allegiance to the Crown may be dealt with by the Crown as it pleases. Thus in *Buron v. Denman*⁵ the defendant, the commander of a British man of war, had destroyed certain property of an alien slave-trader on the coast of Africa in circumstances that would have given a good cause of action to a British subject. It was held, however, that inasmuch as the act of the defendant had been ratified by the British government, no action would lie at the suit of an alien.

Buron
v. Denman.

There seems to be no authority on the point, but presumably the principle of *Buron v. Denman* does not apply to aliens resident in British dominions. By reason of their residence they owe a temporary allegiance to the Crown, and probably have the same protection as British subjects against the illegal acts of public officials.⁶

§ 17.—Foreign Sovereigns and Ambassadors.

Foreign
Sovereigns
not liable.

1. A foreign sovereign is not liable in English courts for any tort committed by him. This is merely a special application of the general principle that foreign sovereigns are wholly exempt from the civil and criminal jurisdiction of English courts. The only remedy for injuries done by them is by way of diplomatic and executive action on the part of the British government.

It makes no difference that the wrongful act is committed in England. A foreign sovereign does not by residing in

⁴ See for example *Penny v. Wimbledon Urban Council* (1899) 2 Q.B. 72.

⁵ (1848) 2 Ex. 167; 76 R.R. 554.

⁶ See Pollock's Torts, p. 108, 7th ed.

British territory waive his privilege or submit himself to the jurisdiction of the local courts. Nor does it make any difference that the wrongful act is done by the sovereign in his private capacity. The exemption extends to all the acts of a sovereign, and not merely to acts of state.¹

2. A foreign sovereign, within the meaning of this rule of immunity, includes: (a) an independent state possessed of corporate or quasi-corporate personality: *e.g.*, the United States of America; (b) the personal head of an independent state under royal or monarchical government; (c) probably the personal head even of a republican State: *e.g.*, the President of the French Republic or of the United States of America.

3. An ambassador accredited to the King of England by a foreign State or sovereign cannot be sued during his term of office for any tort.² The right of action against him, however, is not non-existent, but is merely suspended during his term of office. Upon his recall he becomes subject, like any other alien, to the jurisdiction of English courts, and may be sued even for a cause of action which arose during his period of service. In such a case the Statute of Limitations does not begin to run in his favour until the expiration of his privilege enables a writ to be served upon him.³

Foreign
ambassadors
not liable.

§ 18.—Bodies Corporate.

1. Since a corporation is incapable of acting either right-fully or wrongfully in its proper person, the torts which the law attributes to it are in reality those of the agents or servants by whom it acts and fulfils its functions. Subject to an important qualification to be stated later, this vicarious liability of corporations is determined by the same rules which govern the liability of any other principal for the torts of his agents and servants. Such liability exists, therefore, in two classes of cases:

Liability of
corporations
for acts of
servants and
agents.

(a) A corporation is liable for all torts committed by its

¹ *Mighell v. Sultan of Johore* (1894) 1 Q.B. 149; *The Parlement Belge* (1880) 5 P.D. 197.

² *Magdalena Steam Navigation Co. v. Martin* (1859) 2 E. & E. 94; 7 Anne c. 12.

³ *Musurus Bey v. Gadban* (1894) 2 Q.B. 352.

servants in the course of their employment.¹ For this purpose the servants of a corporation are (1) those persons who have the supreme management of its affairs (*e.g.*, the shareholders of a company in general meeting), and (2) subordinate officials acting under the control and direction of the supreme authority in the corporation (*e.g.*, directors or bank managers).

(b) In the second place, a corporation is liable for all torts committed by agents who are not servants but independent contractors, in all cases in which a similar liability would exist if the principal was an individual person.²

The liability of a corporation for the torts of its agents and servants extends to wrongs of malice and fraud no less than to wrongs of other descriptions. Thus a corporation can be sued for malicious prosecution, or for malicious libel on a privileged occasion, or for fraud, no less than for trespass, conversion, or negligence.³ This was at one time doubted, owing to the fanciful difficulty of imputing fraud or malice to a fictitious person.⁴

Acts *ultra vires* of the corporation.

2. A corporation, however, is not liable for the torts of its servants or agents (even in cases in which individual persons would be liable) unless the authority committed to those servants or agents is *intra vires* of the corporation. A private employer or principal may authorise whatever he pleases, whether lawful or unlawful, and will answer for what he so authorises, and for the manner in which it is done. But a corporation *cannot* authorise anything to be done, except within the limits allowed by law to the corporate action of that particular body. Any authority given beyond these limits is *ultra vires* and void, the acts done under it are not attributed by the law to the corporation, and therefore the corporation cannot be held liable for them.⁵ In the case of an individual employer it is enough if the act of his servant was done within the scope of the employment actually committed to him; but in the case of a corporation there is

¹ See for example *Barwick v. English Joint Stock Bank* (1867) L.R. 2 Ex. 259.

² See for example *Black v. Christchurch Finance Co.* (1894) A.C. 48.

³ *Citizens' Life Assurance Co. v. Brown* (1904) A.C. 423; *Barwick v. English Joint Stock Bank* (1867) L.R. 2 Ex. 259.

⁴ *Abrath v. N.E. Ry. Co.* (1886) 11 A.C. 247, *per* Lord Bramwell.

⁵ *Poulton v. London & S.W. Ry. Co.* (1867) L.R. 2 Q.B. 534.

no liability unless two conditions are fulfilled : (1) the act of the servant must have been within the scope of his employment, (2) his employment must have been within the powers of the corporation.

3. The foregoing rules as to the liability of a corporation are subject to any express or implied indication of a contrary intention in the statute to which the corporation owes its existence. A body corporate which is created by a statute is subject only to the liabilities which the legislature intended to impose upon it. But in the absence of anything to the contrary it is presumed that the legislature intended the corporation to incur the same liabilities as would be incurred by an individual doing the same things. "In every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created."⁶ "The proper rule of construction of such statutes is that in the absence of something to show a contrary intention the legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things."⁷

Statutory limits of liability of corporations.

4. A foreign corporation (that is to say, one which is created by the law of any country other than England) may sue and be sued in England for a tort just as an English corporation may.⁸

Foreign corporations.

§ 19.—Trade Unions.

In *The Taff Vale Railway Co v. Amalgamated Society of Railway Servants*¹ it was held by the House of Lords that a trade union, though not a corporate body, could be sued in an action of tort for the wrongful acts of its officials. Now, however, by sec. 4 of the Trade Disputes Act, 1906,² it is provided that "an action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the

No action will lie against a trade union.

⁶ *Mersey Docks v. Gibbs* (1864) L.R. 1 H.L. at p. 104.

⁷ *Ibid.* at p. 110.

⁸ *Henriques v. Dutch West India Co.* 2 Ld. Raym. 1532; *Newby v. Van Oppen* (1872) L.R. 7 Q.B. 293.

¹ (1901) A.C. 426.

² 6 Ed. VII. c. 47.

trade union, in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court." It is not easy to understand on what principle of justice these wealthy and powerful associations have thus been raised above the law and exempted from all liability for their wrongful acts.

§ 20.—Minors.

Infancy
no defence in
action of
tort.

1. A minor is in general liable for his torts in the same manner and to the same extent as an adult. In certain other branches of the law liability is excluded by the fact that the defendant is below a certain age. Thus a child under seven years of age is exempt from all responsibility for crimes committed by him. A child between the ages of seven and fourteen is presumed to be incapable of criminal intent, though this presumption may be rebutted by proof to the contrary. A person under the age of twenty-one is in general free from all liability for breach of contract. In the law of torts, however, there are no similar rules of exemption. A child of any age may be sued for trespass to land, for example, or injury to property, and will be held liable in damages just as if he were an adult.

Evidential
effect of in-
fancy.

The youth of the defendant is not in all cases wholly irrelevant, however, even in an action of tort. For it may be evidence of the absence of the particular *mens rea* which is an essential element in the kind of tort in question. Thus if an action is based on malice or on some special intent, the fact that the defendant is extremely young is relevant as tending to disprove the existence of any such malice or intent. Similarly it would seem that in order to make a child liable for negligence, it must be proved that he failed to show the amount of care reasonably to be expected from a child of that age. It is not enough that an adult would have been guilty of negligence had he acted in the same way in the same circumstances. This, indeed, seems never to have been decided, but it would seem implied in the decisions on the contributory negligence of children.¹

¹ *Lynch v. Nurdin* (1841) 1 Q.B. 29, 55 R.R. 191; *Harrold v. Watney* (1898) 2 Q.B. 320.

2. When the act of a minor is both a tort and a breach of contract, is he liable for the tort, notwithstanding that the contract is not binding on him, or does his exemption from an action for breach of contract protect him against an action for the tort also? On this point the law cannot be regarded as settled, but the better opinion would seem to be that in such cases liability for the tort exists, and that it is no defence that the act was also the breach of an invalid contract. Thus in *Burnard v. Haggis*² the defendant, a young man under the age of twenty-one, hired a mare for riding, and in breach of his agreement he used her for jumping and so injured her. It was held by the Court of Common Pleas that the defendant was liable for the tort of doing negligent harm to property, notwithstanding the fact that it was at the same time the breach of a non-actionable contract. In *Walley v. Holt*³ a similar decision was given by a Divisional Court in the case of a minor who hired a horse and injured it by over-driving. So if an infant bailee refuses to redeliver the chattel bailed, he can doubtless be sued in trover for the tort of conversion. So if a minor purchases goods, and retains them in his possession while refusing to pay for them, he presumably commits an actionable conversion. Having exercised his right of avoiding the contract, the goods revest in the seller, who is entitled to demand them and sue in trover.⁴

² (1863) 14 C.B. (N.S.) 45.

³ (1876) 35 L.T. 631.

⁴ The rule as above stated to the effect that an infant is liable for his torts even though they are also breaches of contract is contrary, indeed, to the early case of *Jennings v. Rundall* (1799) 8 T.R. 335, 4 R.R. 680, but it is submitted that this case is wrongly decided. The facts were that the defendant hired a horse, and injured it by driving it too far; and he was held not liable in an action of tort, on the ground that the contract of bailment was not binding on him. The decision, therefore, would seem to be directly in conflict with the later cases of *Burnard v. Haggis* and *Walley v. Holt*. An attempt is sometimes made to reconcile them by drawing a distinction between torts which are merely wrongful modes of performing a contract and torts which are outside the contract altogether. This distinction, however, seems a merely verbal one, having no logical basis or substance in it. It is submitted that *Jennings v. Rundall* is a mistaken application of a correct principle, namely that if the act of a minor is in reality merely a breach of contract, he cannot be made liable by being sued in tort instead. In the old days of forms of action and of legal fictions this was a principle very necessary to be insisted on; for in those

Liability of infant for torts which are also breaches of contract.

An infant's liability for fraud in procuring contract

3. There seems to be one exception to the rule that a minor is liable for his torts. It seems that he is not liable in tort for procuring a contract by means of fraudulent representations either as to his age or as to any other matter.⁵ If a minor fraudulently pretends to be of full age, whereby the plaintiff is induced to contract with him, the contract is not for that reason binding on the minor, nor is he estopped from pleading his infancy. Neither, it seems, can the plaintiff sue in tort for the deceit. So if an infant sells a horse and fraudulently represents it to be sound, this representation creates no liability either in contract or in tort. Yet if an infant is capable of fraud, there would seem to be little reason why he should not be liable for it.

Fathers not responsible for their children's torts.

4. A father is not liable for the torts of his children, even while they are under age and living in his house. It is to be observed, however, that a child may be his father's servant, so as to bring the father within the rule as to employer's liability. If a father sends his son on an errand with a horse and cart, he will answer for his son's negligence in driving; but he will answer for him, not as being his father, but as being his employer. Moreover a father may be liable for his own personal negligence in affording or allowing his child an opportunity of doing mischief.⁶

days the tort sued on in a delictal action was often a mere fiction, the real cause of action being a breach of contract and nothing more. Thus a breach of warranty on a sale of goods was commonly sued on in tort instead of contract—*case* instead of *assumpsit*. In was in reference to these quasi-torts or fictitious torts that the courts laid down the rule that an infant or married woman could not be sued in tort unless also liable in contract. Thus in *Green v. Greenbank* (1816) 2 Marsh. 485, 17 R.R. 529, an infant was sued in case for breach of warranty, and the action was held not to lie. Gibbs, C.J., says: "The cases . . . clearly show that where the substantial ground of action rests on promises, the plaintiff cannot by changing the form of action render a person liable who would not have been liable on his promise." But this rule has no application where there is at the same time a *real* tort as well as a real breach of contract. See *ante*, p. 5, n. 3.

⁵ *Johnson v. Pye* (1665) 1 Sid. 258; *Green v. Greenbank* (1816) 2 Marsh. 485, 17 R.R. 529. Since this rule applied at common law to the torts of married women, it would seem clear that it must apply to minors also. *Earle v. Kingscote* (1900) 2 Ch. 585.

⁶ See *Sullivan v. Creed* (1904) 2 Ir. R. 317; *Dixon v. Bell* (1816) 5 M. & S. 198, 17 R.R. 308.

§ 21.—Lunatics.

There is no adequate English authority as to the liability of lunatics for torts committed by them. On principle, however, we may say with some confidence that lunacy is not in itself any ground of exemption, but that, like infancy, it operates (if at all) only as evidence that the requisite *mens rea* is not present. In applying this rule it is necessary to distinguish between different species of wrongs : Lunacy as a defence in an action of tort.

(a) In wrongs based on malice or on some specific intent, like malicious prosecution, malicious libel on a privileged occasion, or deceit, lunacy may be a good defence as disproving the existence of any such malice or intent.

(b) In wrongs of wilful interference with the person, property, reputation, or other rights of other persons, such as trespass, assault, conversion, or defamation, it is no defence that the defendant was under an insane delusion as to the existence of a sufficient legal justification. For in such cases, as we have seen,¹ mistake, however inevitable, is no defence ; and it can make no difference that the mistake is due to unsoundness of mind. A lunatic, therefore, who converts another's property to his own use under the insane delusion that it is his own, or who publishes a defamatory statement under the insane belief that it is true, is just as liable as if he were sane.

(c) In wrongs of absolute liability there is no reason why lunacy should be any defence at all.

(d) In wrongs of negligence the conduct of the defendant must be judged by reference to his knowledge or means of knowledge. Lunacy, therefore, may be relevant as evidence that the necessary knowledge or means of knowledge did not exist. A lunatic who is so mad that he does not know the dangerous nature of poisons and explosives, and who causes harm in consequence, is not negligent in fact ; and there seems no sufficient reason why he should be deemed guilty of negligence in law. If inevitable ignorance of danger is a good defence to a sane man, it would seem clear that it must be none the less a good defence though due to unsoundness of mind.²

¹ *Ante*, p. 12.

² The English authorities as to the liability of lunatics for torts

§ 22.—Married Women.

Actions of
tort between
husband and
wife.

1. In general no husband can sue his wife for a tort, nor can any wife sue her husband for a tort. This is a common law rule which has been expressly preserved by the Married Women's Property Act, 1882.¹ It is subject, however, to the following qualifications :

(a) A wife may sue her husband in any action for the protection and security of her separate property, as if she were unmarried.² Thus she may sue him for the detention or conversion of chattels belonging to her,³ or for negligent injury to her property, or in certain circumstances even for trespass by entering her dwelling-house without her permission.⁴ But she cannot sue him for assault, libel, false imprisonment, or other personal injury. Her remedies for wrongs of this description are to be found in the criminal law, not in the law of torts.

(b) Special provision is made by the Married Women's Property Act, 1882,⁵ for the settlement of disputes between husband and wife as to the ownership or possession of property, a judge of the High Court or of a County Court being empowered on application by summons to make in such a case such order as he thinks just.

are merely early *dicta* to the effect that lunacy is no defence in an action of trespass. Bacon's Maxims of the Law, Reg. VII; *Weaver v. Ward*, Hobart 134; Bacon's Abr. Trespass G. I.; Hale's Pleas of the Crown, I. 15. These *dicta* are clearly sound in the case of intentional trespasses on a supposed justification. As to unintentional trespasses, however, they must be regarded as based on the old and now obsolete idea that trespass is in all respects a wrong of absolute liability. In America there have been numerous cases as to the liability of lunatics, and the authorities will be found collected in *Williams v. Hays*, 42 Am. St. Rep. 743 (1894). The statement in this case that a lunatic will be judged in an action for negligence exactly as if he were sane seems much too absolute. Cf. *Williams v. Hays*, 68 Am. St. Rep. 797 (1899). In *Donaghy v. Brennan*, 19 N.Z. L.R. 289 (1900), the Court of Appeal of New Zealand held a lunatic liable for intentionally wounding the plaintiff by firing a gun at him.

¹ Sect. 12. *Phillips v. Barnett* (1876) 1 Q.B.D. 436.

² Married Women's Property Act, 1882, sec. 12.

³ *Larner v. Larner* (1905) 2 K.B. 539.

⁴ See *Weldon v. De Bathe* (1884) 14 Q.B.D. 339; *Symonds v. Hallett* (1883) 24 Ch. D. 346; *Wood v. Wood* (1871) 19 W.R. 1049.

⁵ Sec. 17.

2. By virtue of the Married Women's Property Act, 1882,⁶ a married woman may be sued for her torts by any one except her husband, in the same manner as a *feme sole*, and her free separate property is liable to satisfy any judgment so obtained against her. Liability of married woman.

3. A husband is liable for all torts committed by his wife during the subsistence of the marriage. This was the common law, and the vicarious liability so imposed upon the husband has not been taken away by the Married Women's Property Acts.⁷ In an action against her husband the wife must be joined as co-defendant. They must defend jointly, and must not put in separate defences, and the judgment cannot be executed against the wife's separate property. The plaintiff, however, may join a claim against the wife separately with a claim against the husband and wife jointly; and in such a case the wife may defend separately, and her separate property will be liable to satisfy the judgment. In the case of a married woman's torts, therefore, the plaintiff has three alternatives: Responsibility of husband for his wife's torts.

- (a) To sue the wife alone, under the Married Women's Property Act;
- (b) To sue the husband and wife jointly at common law;
- (c) To sue the husband and wife jointly at common law; adding a claim against the wife separately under the Act.⁸

4. The liability of the husband ceases on the termination of the marriage, whether by the death of either party or by divorce, even as to torts already committed during the marriage.⁹ Therefore unless an action is commenced and judgment is obtained during the joint lives of husband and wife, it cannot be commenced or continued against the husband or his executors afterwards. So also in the case of divorce. But the separate liability of the wife remains unaffected.

⁶ Sec. 1.

⁷ *Seroha v. Kattenburg* (1886) 17 Q.B.D. 177; *Earle v. Kingscote* (1900) 2 Ch. 585.

⁸ *Beaumont v. Kays* (1904) 1 K.B. 292.

⁹ *Capel v. Powell* (1864) 17 C.B. (N.S.) 743.

The liability of the husband extends to torts committed by his wife even while they are living apart, but it does not extend to torts committed after a judicial separation.¹⁰

5. The liability of a husband does not extend to a fraud committed by his wife in procuring a contract to be made with her.¹¹ A husband, though liable for his wife's torts, is not liable for her contracts; and indeed at common law she was not liable herself on her contracts. A fraud in procuring a contract was and is in the same position in this respect as the contract itself. Since the Married Women's Property Act the wife is liable for her contracts, and therefore for frauds in procuring them, but the husband still remains exempt in each case.¹²

6. A husband is not liable for his wife's antenuptial torts, except to the extent of any property which he has acquired from her on marriage.¹³ Nor is he responsible for his wife's breaches of trust, unless he has acted in the administration of the trust.¹⁴

§ 23.—Executors and Administrators.

Actio personalis moritur cum persona.

Causes of
action in tort
die with the
parties.

1. Subject to the exceptions hereinafter mentioned, no executor or administrator can sue or be sued for any tort committed against or by the deceased in his lifetime. This is the purport of the maxim of the common law, *Actio personalis moritur cum persona*: A personal action dies with the parties to the cause of action. An action for a tort must be begun and finished in the joint lifetime of the wrongdoer and the person injured. If either of them dies before final judgment has been obtained, the cause of action is buried with him.¹

¹⁰ 20 & 21 Vict. c. 85 s. 26. *Head v. Briscoe* (1833) 5 C. & P. 484 : 38 R.R. 841.

¹¹ *Liverpool Adelphi Loan Association v. Fairhurst* (1854) 9 Ex. 422 ; *Wright v. Leonard* (1861) 11 C.B. (N.S.) 258.

¹² *Earle v. Kingscote* (1900) 2 Ch. 585.

¹³ Married Women's Property Act, 1882, s. 14. ¹⁴ *Ibid.*, s. 24.

¹ See *Finlay v. Chirney* (1888) 20 Q.B.D. 494 ; *Phillips v. Homfray* (1883) 24 Ch. D. 439. The question whether a cause of action survives the death of the person injured must be carefully distinguished from

This rule, however, which seems destitute of any rational basis, has been to a very large extent eaten away by exceptions, some of which were admitted by the common law itself, while others have been introduced by statutes ancient and modern. Their aggregate effect is, speaking generally, to abolish the rule so far as it relates to injuries to property, but to leave it in full operation upon injuries of other kinds.

2. *Exception I.* The rule does not apply to breaches of contract (even though they are also torts) which result in pecuniary damage, though it does apply to breaches of contract which are merely personal injuries causing no such damage. Thus in *Bradshaw v. L. & Y. Rly. Co.*² a passenger on the defendants' railway was injured by an accident due to the defendants' negligence, and after an interval he died of the injuries so received. His executrix was held entitled to recover, in an action for breach of contract, the damage to his personal estate arising in his lifetime from medical expenses and his inability to attend to business. But even a breach of contract will die with the parties, if and so far as it is a merely personal injury without any direct or consequential pecuniary loss. Thus executors can neither sue or be sued for a breach of promise of marriage, unless pecuniary damage is shown.³ So in *Bradshaw's* case which has just been cited, no damages were recovered in respect of the personal injuries and suffering of the deceased.

3. *Exception II.* The maxim *Actio personalis moritur cum persona* does not apply to torts which involve the wrongful appropriation or acquisition by one man of property belonging to another. Executors may sue and be sued for the value of that property. This is a second exception established by

Survival of right of action in contract.

Survival of claims for wrongful appropriation of property.

the question whether the act of causing the death of a person gives any right of action for damages to his relatives. The former question is that which is considered in this section; the latter will be dealt with later in connection with the provisions of the Fatal Accidents Act. See Chap. XI.

² (1875) L.R. 10 C.P. 189. This case was doubted in *Leggott v. Gt. N. Rly. Co.* (1876) 1 Q.B.D. at pp. 605, 607, but it seems sound in principle. It was followed in *Daly v. Dublin etc. Rly. Co.* (1892) 30 L.R. Ir. 514.

³ *Chamberlain v. Williamson* (1814) 2 M. & S. 408, 15 R.R. 295; *Finlay v. Chirney* (1888) 20 Q.B.D. 494.

the common law, the maxim in question not being applied so as to allow a wrongdoer to retain another's property or the proceeds of it, simply because the owner from whom he wrongfully took it has since died. Nor conversely is it tolerable that the executors of a wrongdoer should refuse to pay the value of property wrongfully appropriated by the deceased, simply because the wrongdoer is now dead. "The only cases," it has been said,⁴ "in which, apart from questions of breach of contract express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property or the proceeds or value of property belonging to another have been appropriated by the deceased person and added to his own estate or moneys."

4. In order that this exception shall apply, it is not necessary that the property thus appropriated by a deceased person should be traceable *in specie* into the hands of his executors, or even that its proceeds should be so traceable. The rule is not analogous to the rule as to following trust property. All that is necessary to make the executors liable is that the deceased shall have wrongfully appropriated the property and got the benefit of it. Whether he kept it, or consumed it, or sold it, makes no difference. For all unjust benefit so derived by him his executors must account.

Phillips
v. Homfray.

It is not enough, however, that the wrongdoer has in some way derived benefit from the wrong; the benefit must have resulted from the wrongful appropriation of property, otherwise there is no obligation of restitution that will survive. Thus in *Phillips v. Homfray*⁵ the deceased had owned a coal mine adjoining the plaintiff's farm, and had trespassed below the surface of the farm, excavating and removing the coal that was there, and also using the passages so made for the conveyance of large quantities of coal from the deceased's own mine. The plaintiffs sued the executors of the wrongdoer, claiming (1) the value of the coal so taken, (2) payment for the use of the passages upon the plaintiff's property, and (3) compensation for damage done to that property. It was held by the Court of Appeal that the first of these claims

⁴ *Phillips v. Homfray* (1883) 24 Ch.D. p. 454.

⁵ (1883) 24 Ch.D. 439.

was valid, that the second was invalid (since the benefit thus obtained by the deceased was not due to the appropriation of the plaintiff's property), and that the third claim was also invalid, since it was not a claim for the restitution of a wrongful benefit, but one for compensation for wrongful harm.⁶

5. *Exception III.* By the Statute 4 Ed. III. c. 7, executors and administrators may sue for any injury done to the personal estate of the deceased. This is the first of three statutory exceptions to the rule which we are considering. The words of the statute have been liberally construed to include not only executors but also administrators, and not only trespasses but all injuries directly affecting the personal estate of the deceased. Thus in *Twycross v. Grant*⁷ it was held by the Court of Appeal that the executors of a deceased shareholder could sue the promoters of the company for the issue of a fraudulent prospectus, whereby the deceased had been induced to take shares in the company and to part with his money in payment for them. So in *Hatchard v. Mege*⁸ it was held that an action of slander of title to a trade mark survived, and was maintainable by executors. Actions by executors for injury to personal estate.

6. It seems, however, that the statute does not enable executors to sue for pecuniary loss which is consequential upon injuries to the person or reputation or other personal rights of the deceased. There must be a direct injury to the deceased's estate, and not merely a pecuniary loss resulting from an injury of some other kind. Thus in *Pulling v. Gt. Eastern Rly. Co.*⁹ the plaintiff sued as executrix of her late husband, who, while crossing the defendants' railway, was run down in consequence of the defendants' negligence

⁶ Historically this exception to the maxim as to *actio personalis* is apparently an application of the doctrine of waiving a tort and suing on an implied or quasi-contract. Actions of tort died with the parties; actions of contract did not. In those cases, therefore, in which it was permissible to waive the tort and sue instead on a fictitious contract, the maxim could be evaded. The exception, however, must now be regarded as standing on an independent foundation of its own. In modern law there seems to be no subsisting connection between the doctrine of the survival of actions and the doctrine as to the waiver of torts. See *Hamblly v. Trott* (1776) 1 Cowp. p. 375; *Phillips v. Homfray* 24 Ch.D. p. 457. ⁷ (1878) 4 C.P.D. 40.

⁸ (1887) 18 Q.B.D. 771. See also *Oakey v. Dalton* (1887) 35 Ch.D. 700. ⁹ (1882) 9 Q.B.D. 110.

and so injured as to be disabled from working. Some time afterwards he died, and the claim was for loss of wages during his incapacity and for medical expenses; but it was held that the cause of action did not survive the deceased, *Bradshaw's* case¹⁰ being distinguished as a case of contract. So in *Hatchard v. Mege*¹¹ it is laid down that an action of defamation cannot be brought by executors, even on proof of pecuniary damage. The distinction thus indicated is unsatisfactory in principle, and the matter is one that may admit of further judicial consideration. If a false representation causing pecuniary loss is actionable at the suit of executors, as in *Twycross v. Grant*,¹² as being an injury to the personal estate, it is difficult to see on what principle defamation or even personal injury, causing pecuniary damage, should not be actionable on the same ground.

Actions
by executors
for injuries
to real estate.

7. *Exception IV.* By the Civil Procedure Act, 1833,¹³ executors and administrators may sue for any injury done to the real estate of the deceased within six calendar months before his death, but the action must be brought within one year after his death. This rule supplements the rule established by the statute of Ed. III., which, as we have seen, is limited to injuries to the personal estate. It will be noticed, however, that the later statute imposes certain conditions as to time, which do not exist in the earlier.

8. Where the wrong to the real estate consists in the severance and removal of things from the freehold, such as the wrongful excavation of coal, the executors may, if they please, waive the injury to the real estate, and sue in trover or trespass as for an injury to the personal estate, the things so taken having become chattels by the severance.¹⁴ By this device the executors may avoid the limitation of time imposed by the statute of William IV., and sue for injuries committed more than six months before the death of the deceased.

9. Where the wrong is a continuing one, it is sufficient if

¹⁰ (1875) L.R. 10 C.P. 189.

¹¹ (1887) 18 Q.B.D. 771.

¹² (1878) 4 C.P.D. 40.

¹³ 3 & 4 Will. IV. c. 42. s. 2.

¹⁴ *Martin v. Porter* (1839) 5 M. & W. 351, 52 R.R. 745; *Wood v. Morewood* (1841) 3 Q.B. 440 n., 61 R.R. 234.

it continues up to a period within six months before the death, even though it commenced long before ; and damages may then be recovered, subject to the operation of the Statute of Limitations, for the whole duration of the injury.¹⁵ Apparently it makes no difference that the injury was a concealed fraud, unknown to the deceased ; if it was committed more than six months before the death, there is no remedy for it under the statute.

10. *Exception V.* By the Civil Procedure Act, 1833,¹⁶ Actions against executors and administrators may be sued for all injuries committed by the deceased within six months of his death in respect of the property, real or personal, of the plaintiff ; but the action must be brought within six months after the defendants have entered on the administration of the estate.¹⁷

§ 24.—Joint Wrongdoers.

1. Joint wrongdoers are jointly and severally responsible for the whole damage. That is to say, the person injured may sue any one of them separately for the full amount of the loss ; or he may sue all of them jointly in the same action, and even in this latter case the judgment so obtained against all of them may be executed in full against any one of them.¹ How far there is any right of contribution or indemnity as between the wrongdoers themselves, we shall consider later.

2. Persons are to be deemed joint wrongdoers within the meaning of this rule, whenever they are responsible for the same tort ; that is to say, whenever the law for any reason imputes the commission of the same wrongful act to two or more persons at once. This happens in at least three classes of cases, namely (a) agency, (b) vicarious liability, and (c) common action.

(a) *Agency.* Whenever one person employs, or authorises, or procures another to commit a tort, it is imputed in law

¹⁵ *Woodhouse v. Walker*, (1880) 5 Q.B.D. 404 ; *Jenks v. Viscount Clifden* (1897) 1 Ch. 694.

¹⁶ 3 & 4 Wm. IV. c. 42, s. 2.

¹⁷ See for example *Woodhouse v. Walker* (1880) 5 Q.B.D. 404.

¹ *Mitchell v. Tarbutt* (1794) 5 T.R. 649, 2 R.R. 684. It is said, however, in the older authorities that liability arising from the ownership or occupation of land in common is not joint and several, but merely joint. Wms. Saund. I, 291, g. *Sed qu.*

to both the principal and agent, and they are jointly and severally responsible for it as joint wrongdoers. *Qui facit per alium facit per se.*²

(b) *Vicarious liability.* There are many cases in which the law for various reasons imputes to one person, who has in fact had no part in it, a wrongful act committed by another. In these cases the person who really commits the act and the person who is thus held vicariously responsible for it are joint wrongdoers. Thus a master and his servant are jointly and severally liable for acts done by the servant in the course of his employment, although not authorised by the master. Similarly partners are joint wrongdoers in respect of any tort committed by one of them within the scope of the partnership business. So the employer of an independent contractor is a joint wrongdoer with him in those exceptional cases in which the negligence of such a contractor renders his employer liable.³

(c) *Common action.* The third and last class of joint wrongdoers consists of persons who, by joining together in some form of common action, become responsible together for some tort which is committed in the course of it. For example two persons agree together to publish a defamatory libel, or they hire a conveyance and drive it negligently and cause an accident, or they go for a walk together and by mistake trespass upon the plaintiff's property. Under this head must be included all cases in which persons incur a common responsibility by owning or occupying property in common, as when two partners are held liable for the dangerous state of the partnership premises, or two owners of a horse or dog are held responsible for mischief done by it. So if two men engage the same servant in the same service, they are jointly and severally responsible for him.

Not necessarily joint wrongdoers because they cause the same damage.

3. Persons are not joint wrongdoers simply because their independent acts have been the cause of the same wrongful damage. They must in fact or in law have committed the

² "All who procure a trespass to be done are trespassers themselves." *Wilson v. Tuman* (1843) 6 M. & G. at p. 244 ; 64 R.R. p. 777.

³ The vicarious liability of a husband for his wife's torts is *sui generis*, and is governed by rules which are not in conformity with the ordinary law as to joint wrongdoers.

same wrongful act. Thus in *Thompson v. London County Council*⁴ the plaintiff's house was injured by the subsidence of its foundations, caused by excavations negligently made by A, taken in conjunction with the negligence of B, a water company, in leaving a water main insufficiently stopped. It was held that A and B, inasmuch as their acts were independent of each other, were not joint wrongdoers, and could not be joined as such in the same action. "The damage," said Collins, L.J.,⁵ "is one, but the causes of action which have led to that damage are two, committed by two distinct personalities." Similarly where successive and independent acts of conversion have been committed by different persons in respect of the same chattel, each of these persons is liable in trover to the owner for the full value of the chattel, but they are not joint wrongdoers.⁶ They are severally liable for the same damage, not jointly liable for the same tort. So also in all those cases in which a person is held liable for negligence, notwithstanding the fact that the immediate cause of the accident was the intervening negligence of another person.⁷ These persons are both liable for the damage done, but they are liable severally, not jointly.⁸

⁴ (1899) 1 Q.B. 840. See also *Sadler v. Gt. W. Rly. Co.* (1896) A.C. 450. ⁵ (1899) 1 Q.B. p. 845.

⁶ See *Morris v. Robinson* (1824) 3 B. & C. 196; 27 R.R. 322.

⁷ Such as *Clark v. Chambers* (1878) 3 Q.B.D. 327.

⁸ The rules applicable to persons who are thus severally liable for the same damage, instead of being jointly and severally liable for the same tort, seem to be the following:

(a) They cannot be joined in the same action for damages. For it is not permissible in one and the same action to claim damages from A for one tort and from B for another. *Sadler v. Gt. W. Rly. Co.* (1896) A.C. 450. But this rule does not prevent a plaintiff who complains of a single tort, but is uncertain which of two persons is liable for it, from joining them in the same action; and in such an action he may obtain judgment against one of the defendants even though the other is proved not to be liable. *Bullock v. London General Omnibus Co.* (1907) 1 K.B. 264.

(b) Judgment against one of them is no bar to an action against the other, but since the plaintiff cannot be allowed to recover satisfaction more than once, payment by one of the wrongdoers will reduce the damages recoverable from the others. *Morris v. Robinson* (1824) 3 B. & C. 196; 27 R.R. 322.

(c) A release of one will presumably not release the others.

(d) Unless the wrong is a wilful one, so as to come within the analogy

Judgment
against one
joint wrong-
doer.

Brinsmead v.
Harrison.

4. A judgment obtained against one joint wrongdoer releases all the others, even though it is not satisfied. This rule was established by the judgment of the Court of Exchequer Chamber in *Brinsmead v. Harrison*.⁹ It applies even to cases in which the plaintiff was ignorant, when he obtained judgment against the one wrongdoer, that he possessed any right of action against the other: as, for example, when the other is a concealed principal in the matter. For the judgment, even when so obtained in ignorance, merges and destroys the whole cause of action.

A different rule is applicable to joint and several liability for breach of contract, for in that case a judgment obtained against one will not, unless satisfied in full, be any bar to a subsequent action against the others.¹⁰ In ordinary cases, however, liability for breach of contract is merely joint, and not joint and several; and a judgment against one contractor so liable will discharge the others even without satisfaction.

Release of
one joint
wrongdoer.

5. The release of one joint wrongdoer releases all the others, even though this was not the intention of the parties. "It is, we think," says A. L. Smith, L.J., in *Duck v. Mayeu*,¹¹ "clear law that a release granted to one joint tortfeasor or to one joint debtor operates as a discharge of the other joint tortfeasor or the other joint debtor, the reason being that the cause of action, which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released." This rule is equally applicable to a release under seal and to a release by way of accord and satisfaction.¹²

A mere covenant or other agreement not to sue one of the joint wrongdoers must, however, be distinguished from an actual release given to him, whether by deed or by accord and satisfaction. An agreement not to sue does not, like a release, destroy the cause of action, but merely prevents it from being enforced against the particular wrongdoer with whom the agreement was made.¹³

of the rule in *Merryweather v. Nixan*, there seems to be no reason why such wrongdoers should not have a claim for contribution *inter se*. *Infra*, p. 74. ⁹ (1871) L.R. 7 C.P. 547.

¹⁰ *King v. Hoare* (1844) 13 M. & W. 494; 67 R.R. 694.

¹¹ (1892) 2 Q.B. at p. 513

¹² *Thurman v. Wild* (1840) 11 A. & E. 453.

¹³ *Duck v. Mayeu* (1892) 2 Q.B. 511.

A transaction which is in form an actual release, whether by deed or by accord and satisfaction, will be construed as being merely an agreement not to sue, if it contains an express reservation of the right to proceed against the other wrongdoers. For this reservation would otherwise be wholly ineffective.¹⁴

§ 25.—Contribution between Wrongdoers.

1. No person who has been guilty of fraud or any other form of wilful wrongdoing, and has been made liable in damages, has any right of contribution or indemnity against any other person who is a joint wrongdoer with him. This is commonly known as the rule in *Merryweather v. Nixan*,¹ the case in which it was first laid down, but in which it was very imperfectly considered and formulated. Where the rule is applicable, any wrongdoer who is compelled to pay the whole or more than his proportionate share of the damage, is precluded from making any claim upon his fellow-offenders for a fair division of the burden between them. The reason alleged is the technical one that any such claim must be based on an implied contract between the wrongdoers, and that such a contract is necessarily illegal and void, as being made in contemplation of the commission of an illegal act. But this reasoning is unconvincing; contribution between joint wrongdoers is no more based on a contract, than is contribution between joint sureties. It is based on the principle of justice, that a burden which the law imposes on two men should not be borne wholly by one of them. The rule in *Merryweather v. Nixan*, however, is now too firmly established to be questioned. Lord Herschell says in a Scottish case:² "It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity or even of public policy, which justifies its extension to the jurisprudence of other countries."

¹⁴ *Duch v. Mayeu* (1892) 2 Q.B. 511; *Balson v. Gosling* (1871) L.R. 7 C.P. 9.

¹ (1799) 8 T.R. 186; 16 R.R. 810.

² *Palmer v. Wick and Pulleneytown Steam Shipping Co.* (1894) A.C. at p. 324.

Limits
of the rule.

2. The better opinion is that the rule in *Merryweather v. Nixan* applies only to cases of wilful and conscious wrongdoing, and that it is not applicable to cases of mere negligence, accident, mistake, or other unintentional breaches of the law. In *Betts v. Gibbins*³ it is said by Denman, C.J.: "The general rule is that between wrongdoers there is neither indemnity nor contribution; the exception is where the act is not clearly illegal in itself." So in *Adamson v. Jarvis*,⁴ Best, C.J., says: "From reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." In *Palmer v. Wick and Pulleneytown Shipping Co.*⁵ Lord Herschell quotes with approval these observations, and regards them as establishing a right of contribution in a case of joint negligence.⁶

Statutory
exception.

3. A statutory exception to the rule in *Merryweather v. Nixan* has been created by the Directors' Liability Act, 1890, which provides that there shall be a right of contribution between directors or promoters who are jointly and severally liable under the provisions of that Act.⁷

Contribution
and indem-
nity.

4. Except in the case of wilful wrongdoing, there is, if the foregoing interpretation of the rule in *Merryweather v. Nixan* is correct, a right either of contribution or of indemnity between joint wrongdoers. The right is one of contribution—all the wrongdoers sharing equally—unless there is some special reason why one or some of them should bear the whole loss and indemnify the others. Such a right of indemnity exists in at least two classes of cases:

(a) A principal must indemnify his agent for all liability

³ (1834) 2 A. & E. p. 74; 41 R.R. p. 394.

⁴ (1827) 4 Bing. p. 73; 29 R.R. p. 508.

⁵ (1894) A.C. p. 324. See also *Burrows v. Rhodes* (1899) 1 Q.B. p. 828 per Kennedy, J.

⁶ On the other hand in *The Englishman and the Australia* (1895) P. 212, Bruce, J., held in a case of damage due to negligence that there was no right of contribution or indemnity in the absence of special circumstances creating an implied contract to that effect. It is not easy to see, however, why an implied contract of contribution should be required in the case of joint wrongdoers any more than in the case of co-sureties.

⁷ See *Gerson v. Simpson* (1903) 2 K.B. 197.

incurred by him in consequence of the act authorised being (without the knowledge of the agent) an illegal one. Thus in *Adamson v. Jarvis*⁸ the plaintiff, an auctioneer, was held entitled to be indemnified by the defendant, a client who had instructed him to sell goods to which, as it subsequently appeared, he had no title.

(b) It seems clear on principle, also, that in all cases of vicarious liability the person held vicariously liable for the tort of another must have a right of indemnity as against that other. Thus a master who has paid for the negligence of his servant can doubtless sue that servant for indemnity.

§ 26.—Principal and Agent.

1. Any person who authorises or procures a tort to be committed by another is responsible for that tort, as if he had committed it himself. *Qui facit per alium facit per se.* ^{Responsibility of principal for agent.} "All who procure a trespass to be done are trespassers themselves."¹ Principal and agent, therefore, are jointly and severally liable as joint wrongdoers for any tort authorised by the former and committed by the latter.

Speaking generally, a principal is liable only for those acts of his agent which he actually authorises (expressly or impliedly). He is not in general liable for unauthorised torts committed by the agent in the course of his agency. He is not, for example, responsible in ordinary cases, if the agent by negligence, mistake, or fraud, does some illegal act in the execution of his employment. This rule, however, is subject to exceptions. By far the most important of them is that which governs that particular form of agency which exists in the case of master and servant; this we shall consider separately in succeeding sections of this chapter. Other exceptions exist in the case of particular kinds of torts, and will be considered in connection with them: by reason of certain anomalous rules of absolute or vicarious liability, there are cases in which a person cannot delegate to an agent the per-

⁸ (1827) 4 Bing. 66; 29 R.R. 503. See also *Burrows v. Rhodes* (1899) 1 Q.B. 816.

¹ *Wilson v. Tumman* (1843) 6 M. & G. at p. 244; 64 R.R. at p. 777.

formance of certain kinds of acts, without being responsible for the negligence or other illegality of the agent in the doing of them.

Liability
arising from
ratification.

2. *Ratification.* If one person commits a tort while acting on behalf of another but without his authority, and that other subsequently ratifies and assents to the act so done, he thereby becomes responsible for it, just as if he had given a precedent authority for its commission. "That an act done for another by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority."² In other words, the rule that an authority subsequent is equivalent to an authority precedent is applicable not merely in the law of contracts, but in the law of torts also.

Conditions of
ratification.

3. In order that ratification of an unauthorised act should thus make the principal responsible for it, the following conditions must be fulfilled :

(a) The wrongful act must have been done on behalf of the principal. No man can ratify an act which was not done on his behalf, but on behalf of the doer himself. "By the common law," says Coke,³ "he that receiveth a trespasser and agreeth to a trespass after it be done is no trespasser unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment." In the case of contracts it has been decided by the House of Lords in *Keighley Maxsted & Co. v. Durant*⁴ that there can be no ratification, unless the agent not merely contracts on behalf of the principal, but also avows that intention at the time. Possibly the same rule applies to torts also.⁵ But if this is so, it must be understood that

² *Wilson v. Tumman* (1843) 6 M. & G. p. 242; 64 R.R. p. 776.

³ Fourth Inst. 317.

⁴ (1901) A.C. 240.

⁵ See, however, Lord Robertson's observations at p. 260.

the necessary avowal need not be expressed in words, but may sufficiently appear from the conduct of the parties and the facts of the case. It cannot be necessary for a railway official, who arrests a passenger for defrauding the railway company, to state in terms that he does so on behalf of the company.

(b) A second condition of effective ratification is that the principal must know the nature of the act which has thus been done on his behalf, unless, indeed, he is content to dispense with any such knowledge and to approve and sanction the acts of the agent whatever they may be.⁶ It is sufficient, however, if the principal has such knowledge of the nature of the act as would have sufficed to make him liable, had he actually authorised it or done it himself. Mistake or ignorance is no greater defence to a principal who gives an authority subsequent, than to one who gives an authority precedent.⁷

4. When an illegal act done by one person on behalf of another but without his authority would have been legal, had it been done with his authority, it becomes legal *ab initio* if he subsequently ratifies it.⁸ This rule, taken in conjunction with the one which has just been considered, shows that the ratification of a tortious act has two quite distinct effects : (a) it sometimes makes the principal liable as well as the agent ; (b) in other cases it justifies the act, and destroys the liability which the agent has already incurred by doing it. Which of these two effects it produces in any case depends on whether the principal himself could lawfully have done or authorised the act.

An act may be thus justified by ratification, even after the commencement of an action against the agent ; but the ratification must in all cases have taken place at a time when the principal still retained the power of lawfully authorising the act to be done.⁹

⁶ *Freeman v. Rosher* (1849) 13 Q.B. 780, 78 R.R. 514 ; *Lewis v. Read* (1845) 13 M. & W. 834, 67 R.R. 828.

⁷ *Hilbery v. Hatton* (1864) 2 H. & C. 822.

⁸ *Whitehead v. Taylor* (1839) 10 A. & E. 210, 50 R.R. 385 ; *Buron v. Denman* (1848) 2 Ex. 167, 76 R.R. 554 ; *Hull v. Pickersgill* (1819) 3 Moore 612, 21 R.R. 598.

⁹ *Bird v. Brown* (1850) 4 Ex. 786, 80 R.R. 775.

Act of agent
justified by
ratification.

§ 27.—Partners.

Partners
liable for
each other's
torts.

By the Partnership Act, 1890, ss. 10 and 12, it is provided, in affirmance of the common law, that partners are jointly and severally liable for each other's torts committed "in the ordinary course of the business of the firm." Thus in *Hamlyn v. Houston*¹ a firm was held liable for the act of one of the partners who, on behalf of the firm, induced by bribery a servant of the plaintiff to commit a breach of his contract of service. Whether the act of a partner is one done in the course of the business of the firm is a question to be determined on the same considerations as those which determine the responsibility of a master for the acts of his servant. Indeed for this purpose we may regard each partner as the servant of the firm.

§ 28.—Masters and Servants.

Employer's
liability.

1. A master is liable for any tort committed by his servant while acting in the course of his employment. This is by far the most important of the various cases in which vicarious responsibility is recognised by the law. Its rational justification is to be found in the presumption that the negligence and other torts of a servant in the execution of his master's business are either actually authorised by the master, or at least are the result of some want of care on the master's part in the choice of competent servants or in the superintendence and control of their work. Very often this presumption does not correspond with the facts; but the difficulty of actually proving some default on the part of the master would be so great, that it is better on the whole to create a legal presumption against the master, and even to make that presumption irrebuttable.

2. In order that this rule of vicarious responsibility may apply, there are two conditions which must co-exist:

- (a) The relationship of master and servant must exist between the defendant and the person committing the wrong complained of;
- (b) The servant must in committing the wrong have been acting in the course of his employment.

¹ (1903) 1 K.B. 81.

3. A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done. ^{Who is a servant.}

If we use the term agent to mean any person employed to do work for another, we may say that agents are of two kinds, distinguishable as (1) servants and (2) independent contractors. It is for the first kind of agent only, that his employer is responsible under the rule which we are now considering. When the agent is an independent contractor, his employer is not answerable save for torts actually authorised by him. But when the agent is a servant, his employer will answer not merely for all torts actually authorised, but also for all those which are committed by the servant while engaged in doing his master's business, whether they are authorised or not.

4. What, then, is the test of this distinction between a servant and an independent contractor? The test is the existence of a right of control over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it; he is bound by his contract but not by his employer's orders. "Upon the principle that *qui facit per alium facit per se*," says Baron Parke in *Quarman v. Burnett*,¹ "the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer—he who selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey."

Thus my coachman is my servant, and if by negligent driving he runs over some one in the street, I am responsible. But the cabman whom I engage for a particular journey is

¹ (1840) 6 M. & W. at p. 509; 55 R.R. p. 726.

not my servant ; he is not under my orders ; he has made a contract with me, not that he will obey my directions, but that he will drive me to a certain place ; if an accident happens by his negligence he is responsible, and not I. So I am responsible for the domestic servants in my house, but I am not responsible for a skilled artisan whom I engage to do a certain job in my house, for example to paint it, or to mend a window. So in *Evans v. Liverpool Corporation*² it was held that a municipal corporation establishing a hospital is not responsible for the negligence of a physician appointed by them.³

Temporary
or gratuitous
service suffi-
cient.

5. One person may be the servant of another, although employed, not continuously, but for a single transaction only, and even if his service is gratuitous or *de facto* merely. The relationship of master and servant is commonly a continuing engagement in consideration of wages paid ; but this is not essential. One person may be the servant of another on a single occasion and for an individual transaction, provided that the element of control and supervision is present. Moreover the service may be merely gratuitous, as when the owner of a carriage asks a friend to drive it for him.⁴ On the same principle, a father may be responsible for the torts of his children, provided that they are acting *de facto* as his servants.

Effect of
lending a ser-
vant.

6. A servant may have two or more masters at the same time in respect of different employments. In particular a master may lend his servant to another person for a certain transaction, so that *quoad* that employment he becomes the

² (1906) 1 K.B. 160.

³ By statute 1 & 2 Wm. IV. c. 22. the proprietors of hackney cabs in London are made responsible for the negligence of the drivers to whom the cabs are hired, as if the relationship of master and servant existed between them. In fact the relationship is that of bailor and bailee. *Keen v. Henry* (1894) 1 Q.B. 292 ; *Gates v. Bill* (1902) 2 K.B. 38. Another anomalous rule makes a litigant, though no relationship of master and servant exists between him and his solicitor, liable in certain cases for mistaken and illegal acts done by the latter in the course of the litigation. *Jarman v. Hooper* (1843) 6 M. & G. 827 ; *Smith v. Keal* (1882) 9 Q.B.D. 340 ; *Morris v. Salberg* (1889) 22 Q.B.D. 614.

⁴ *Wheatley v. Patrick* (1837) 2 M. & W. 650 ; 46 R.R. 731. *Alister* if he lent the carriage to a friend.

servant of the person to whom he is so lent, though he remains for other purposes the servant of the lender. When a servant is sent by his employer to do work for another, it is a question of fact, depending on the nature of the arrangement and the degree of control exercised over the servant, whether he becomes *quoad hoc* the servant of the person for whom he is working, or remains in all respects the servant of his ordinary employer. When a servant has thus two masters, the responsibility for a tort committed by him lies exclusively upon the master for whom and under whose control he was working when he did the act complained of.

Thus in *Donovan v. Laing Construction Syndicate*⁵ the defendants contracted to supply a firm of wharfingers with a crane and a man to work it. This man received directions from the wharfingers or their servants as to the working of the crane, and the defendants had in that respect no control over him. An accident having happened through the negligent management of the crane, it was held that the defendants were not liable, on the ground that the man in charge of the crane was *quoad hoc* the servant of the wharfingers, and that they alone were responsible for him. "For some purposes," says Lord Esher,⁶ "no doubt the man was the servant of the defendants. Probably if he had let the crane get out of order by his neglect, and in consequence any one was injured thereby, the defendants might be liable; but the accident in this case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co." So Bowen, L.J., says:⁷ "We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act."

Similar decisions are *Rourke v. White Moss Colliery Co.*,⁸ *Murray v. Currie*,⁹ and *Jones v. Scullard*.¹⁰ In the first of these cases Cockburn, C.J., says:¹¹ "When one person lends his servant to another for a particular employment, the servant

⁵ (1893) 1 Q.B. 629.⁶ At p. 632.⁷ At p. 633.⁸ (1877) 2 C.P.D. 205.⁹ (1870) L.R. 6 C.P. 24.¹⁰ (1898) 2 Q.B. 565.¹¹ (1877) 2 C.P.D. at p. 209.

for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." So in *Hall v. Lees*¹² it was held that a nursing association was not liable for the negligence of a nurse while employed in the house of a patient, the nurse being in these circumstances no longer the servant of the association.

Quarman v.
Burnett.

7. Where, on the other hand, the servant of A is appointed by him to do work for B, but remains exclusively subject to the control and direction of A, he remains the servant of A, and B is not responsible for him. Thus in *Quarman v. Burnett*¹³ it was held that he who hires horses from a livery stable keeper, together with a man to drive them, is not responsible for the negligence of the driver; and that this is so, even though the defendant habitually engages the same driver, and even if he is the owner of the carriage driven. So in *Jones v. Corporation of Liverpool*¹⁴ the defendant corporation was held not liable for the negligence of the driver of a watering cart belonging to them, the driver and horses having been supplied to the defendants by a contractor who employed and paid the driver, and the defendants having exercised no control over him, except to instruct him what streets to water. Similarly in *Waldeck v. Winfield*¹⁵ a company hired from the defendant a van, horse, and driver, for the purpose of delivering goods to their customers; and it was held that responsibility for the negligence of the driver rested on the defendant who supplied, and not on the company who used him.¹⁶

Superior
servant not
responsible
for subordi-
nates.

8. A superior servant is not the master of the inferiors who are under his control, and he is not responsible for their torts. Thus the head of a government department or other public official is not responsible for the wrongdoing of servants

¹² (1904) 2 K.B. 602.

¹³ (1840) 6 M. & W. 499; 55 R.R. 717.

¹⁴ (1895) 14 Q.B.D. 890.

¹⁵ (1901) 2 K.B. 596. See also *Dewar v. Tasher* 23 T.L.R. 259.

¹⁶ In *Jones v. Scullard* (1898) 2 Q.B. 565, the defendant owned his own horses and carriage, but hired a driver from a livery stable, and was held liable for his negligence, *Quarman v. Burnett* being distinguished. It is clear that the owner of horses must have a complete right of control over the driver, even when hired from a livery stable, which is absent if the horses are hired also.

engaged by him and under his control. The relationship between them is not that of master and servant; they are fellow-servants of the Crown.¹⁷ For the same reason the directors of a company are not responsible for torts committed by inferior servants of the company, although appointed and controlled by these directors.¹⁸

9. The rule of employers' liability extends to trustees and bodies corporate charged with the management of public property and with the exercise of public functions, in the same manner and to the same extent as in the case of private employers, subject, however, to the two following qualifications:

Public authorities responsible for their servants.

(a) Such trustees or bodies corporate are in some cases merely departments of the central executive government, and so mere servants of the Crown and exempt from liability in accordance with the rule stated in the last paragraph.

(b) Such trustees or bodies corporate may be expressly or impliedly exempted from liability for the acts of their servants by the statute under which they exercise their functions.¹⁹

§ 29.—The Course of Employment.

1. A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master.

Master not liable except for acts done in course of servant's employment.

It is clear that the master is responsible for acts actually authorised by him; for liability would exist in this case, even if the relation between the parties were merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even

¹⁷ *Raleigh v. Goschen* (1898) 1 Ch. 73; *Bainbridge v. Postmaster-General* (1906) 1 K.B. 178.

¹⁸ *Weir v. Barnett* (1877) L.R. 3 Ex. D. 32; *Weir v. Bell* (1878) 3 Ex. D. 238.

¹⁹ See *Mersey Docks Trustees v. Gibbs* (1864) L.R. 1 H.L. 93. More-over a subordinate official is not necessarily the servant of a public body, simply because he is appointed to his position by that body under a statutory authority or duty in that behalf. *Stanbury v. Exeter Corporation* (1905) 2 K.B. 838.

for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes—although improper modes—of doing them.¹ In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. In respect of the manner of his work a servant is, as we have seen, under the control of his master; and this control brings with it a corresponding responsibility. Therefore if a servant does negligently that which he was authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud, or mistake. "In all these cases," says the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank*,² "it may be said that the master has not authorised the act. It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible. For in such a case the servant is not acting in the course of his employment, but has gone outside of it. He can no longer be said to be doing, although in a wrong and unauthorised way, what he was authorised to do; he is doing what he was not authorised to do at all.

Effect of
express pro-
hibition.

2. Even express prohibition of the wrongful act is no defence to the master, if that act was merely a mode of doing what the servant was employed to do. Thus in *Limpus v. London General Omnibus Co.*³ the defendant company was held liable for an accident caused by the act of one of its drivers in drawing across the road so as to obstruct a rival omnibus, and it was held to be no defence that the company had issued specific instructions to its drivers not to race with

¹ See Clerk & Lindsell's Law of Torts, p. 75, 4th ed.

² (1867) L.R. 2 Ex. 259 at p. 266.

³ (1862) 1 H. & C. 526.

or obstruct other vehicles. The driver whose conduct was in question was engaged to drive, and the act which did the mischief was a negligent mode of driving, for which his employers must answer, irrespective of any authority or of any prohibition. Prohibition is relevant in considering what the scope of the servant's employment was, and therefore in determining whether the wrongful act was or was not a mode of exercising that employment; but it is powerless to exclude an employer's liability for the wrongful acts of his servant within the sphere permitted to him.

3. There are two distinct ways in which the wrongful act of a servant may fall outside the course of his employment so as to exempt his employer from liability. It may do so either because of its *nature* or because of the *intention* with which it was done. In the first place the act may be in its own nature so foreign to the nature of the servant's employment, that his master is not responsible for it even though it is done by the servant on his master's behalf. In the second place the act, although it is not in its own nature foreign to the servant's employment, may fall outside the course of that employment because done by him not on behalf of his master, but solely on his own account and in pursuance of his own affairs, and therefore not in his capacity as a servant. We shall deal with these two cases separately in the succeeding sections.⁴

§ 30.—Excess of a Servant's Authority.

1. A master is not liable for any act done by his servant even on behalf of his master and with intent to serve his interests, if the act is so foreign to the nature of the servant's employment that it cannot be regarded as a mode of performing that employment. Master not liable if servant exceeds his authority.

Thus in *Beard v. London General Omnibus Company*¹ the defendant company was held not liable for a collision caused by the negligence of the conductor of an omnibus, who at

⁴ In the same way a principal is not bound by his agent's contract (apart from questions of apparent authority and estoppel) unless that contract was (a) within the limits of the agent's authority and (b) made by the agent on the principal's behalf and not on his own.

¹ (1900) 2 Q.B. 530.

the end of a journey and in the temporary absence of the driver, took upon himself to drive the omnibus for the purpose of turning it round for the return journey. Driving an omnibus is not a mode rightful or wrongful of performing the duties of a conductor; and the accident happened, not because the conductor failed to perform his own duty, but because without authority he attempted to fulfil that of a driver. So in *The Bank of New South Wales v. Owston*² it was held by the Privy Council that the arrest and prosecution of offenders is not within the ordinary scope of the authority of a bank manager, and therefore that in the absence of evidence of special authorisation a bank was not responsible for a malicious prosecution undertaken by its manager. On the same principle in *Abrahams v. Deakin*³ the owner of a public-house was held not liable for the act of his servant who, while in charge of the bar, gave the plaintiff into custody on a mistaken charge of attempting to pass bad money.⁴

We may contrast with these cases the decision of the Exchequer Chamber in *Bayley v. Manchester Railway Co.*,⁵ in which it was held that the defendant company was liable for the act of a porter in violently putting a passenger out of a railway carriage, under the erroneous belief that he was in the wrong train. Here it was one of the duties of the porter to prevent passengers from getting into the wrong trains, and although the plaintiff was in fact in the right train, yet the act of the porter was merely a wrong and mistaken way of doing the work intrusted to him, and not an unauthorised assumption of work that did not pertain to him. Similarly in *Seymour v. Greenwood*⁶ the defendant was held liable for the mistaken act of his servant, the conductor of an omnibus, in ejecting by force an unoffending passenger.

² (1879) 4 A.C. 270.

³ (1891) 1 Q.B. 516.

⁴ See also *Hansen v. Waller* (1901) 1 K.B. 390; *Allen v. London & S.W. Rly. Co.* (1870) L.R. 6 Q.B. 65; *Goff v. Gt. W. Rly. Co.* (1861) 3 E. & E. 672; *Edwards v. London & N.W. Rly. Co.* (1870) L.R. 5 C.P. 445.

⁵ (1873) L.R. 8 C.P. 148.

⁶ (1861) 7 H. & N. 355.

§ 31.—Acts Done by a Servant on his own Behalf.

1. Even when an act is in its nature within the scope of the servant's employment, the master is not responsible for it unless the servant in committing it was acting on his master's behalf. A master is not responsible for what his servant does while engaged, not on his master's business, but exclusively on his own; he must answer only for what his servant does as his servant, not for what he does in pursuance of his own affairs. A servant is not acting in the course of his employment, when he is acting not for his employer but solely for himself.

Master not
liable if ser-
vant acts in
his own be-
half.

2. This general principle has the effect of exempting an employer from liability in at least four important classes of cases which require special consideration :

- (a) When a servant is guilty of fraud or other wilful wrongdoing on his own account ;
- (b) When he uses his master's property for his own purposes without authority and does harm thereby ;
- (c) When he is guilty of negligence contemporaneous with the execution of his master's business but not in connection with it ;
- (d) When he is negligent in that which his master permits him to do on his own account, but does not employ him to do.

3. *Wilful wrongdoing by a servant in his own interest.* The liability of a master extends, speaking generally, to frauds and other wilful wrongs, no less than to negligence and mistake. If his servant does fraudulently what he is employed to do honestly, the master must answer for the fraud. Thus in *Barwick v. English Joint Stock Bank*¹ the defendant bank was held liable for a fraudulent representation made to the plaintiff by the manager of one of the bank's branches in relation to the business under his control. "With respect to the question," says Willes, J., delivering the judgment of the Exchequer Chamber,² "whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

The Wilful
wrongdoing
of servant.

¹ (1867) L.R. 2 Ex. 259.

² *Ibid.* at p. 265.

Where, however, the fraud or other wilful wrong of the servant is committed on his own account and not for the benefit of his master, the master is not answerable. Thus in *British Mutual Banking Co. v. Charnwood Forest Rly. Co.*³ the defendant company was held not liable for a fraudulent representation made by its secretary in his own interest, although in a matter which in its nature was within the scope of his employment. On the same principle an employer who receives property for safe custody is not responsible, if it is stolen by one of his servants without the negligence of the employer or of any of his other servants charged with the care of it.⁴

Use of
master's prop-
erty for
servant's
purposes.

4. *Servant's unauthorised use of his employer's property.*

A master is not responsible for the negligence of his servant in the unauthorised use of his master's property for the servant's own purposes. This rule has been applied on several occasions when harm has been done by the negligent driving of servants, while using their master's horses and conveyances for their own ends. These cases have established the rule that a master is not responsible merely because he intrusted to the care of his servant the instrument which did the mischief. The test is not whether the servant was intrusted with it, but whether he was using it in his master's business or in his own. "The question," says Maule, J.,⁵ "is not whether the servant was trusted, but whether he was employed, so as to make his master liable. The way it is always put is, whether the man was about his master's business at the time."

Accordingly in *Mitchell v. Crassweller*⁶ the defendant's servant was engaged to drive a cart, and on returning to his employer's premises at the end of his day's work it became his duty to take the horse and cart to the stables. Instead of doing so, he drove away on a new journey for his own purposes exclusively; and while returning he injured the plaintiff by negligent driving. It was held that the defendant, his master, was not liable. Similar decisions have been given

³ (1887) 18 Q.B.D. 714.

⁴ *Giblin v. McMullen* (1868) L.R. 2 P.C. 317; *Cheshire v. Bailey* (1905) 1 K.B. 237. Cf. *Abraham v. Bullock* (1902) 86 L.T. 796.

⁵ *Mitchell v. Crassweller* (1853) 13 C.B. 237 at p. 243.

⁶ (1853) 13 C.B. 237.

on more or less similar facts in *Storey v. Ashton*,⁷ *Rayner v. Mitchell*,⁸ and *Sanderson v. Collins*.⁹

5. It is to be observed, however, that if the servant is really engaged on his master's business, the fact that he is at the same time engaged on his own is no defence to the master ; even though it was the competing claims of the servant's business which caused him to perform his master's negligently. The master is exempt only when the servant was exclusively on his own business. If while driving his master's cart in the course of his employment, he lights his pipe, and while so engaged causes a collision by not looking where he is going, his master will be liable ; and it will be no defence to him to allege that the servant in lighting his pipe was engaged on his own business and not on his master's ; for he was in truth engaged on both. So where a carman deviates for his own purposes from the direct line which he ought to have followed in the execution of his master's business, and an accident happens while this deviation still continues, it is a question of degree whether the deviation is so great that the servant can no longer be said to be driving on his master's business, but to be on a journey of his own, or whether on the other hand the deviation is so slight, that it may be said to be part of the journey on which his master sent him. In *Joel v. Morison*¹⁰ Parke, B., says : " If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. . . . The master is only liable where the servant is acting in the course of his employment. If he was going out of his way against his master's implied commands, when driving on his master's business, he will make his master liable ; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." So in *Storey v. Ashton*¹¹ Cockburn, C.J., says : " I am very far from saying, if the servant, when going on his master's business, took a somewhat longer road, that owing to this deviation he would cease to be in

Servant engaged both on his master's business and on his own.

⁷ (1869) L.R. 4 Q.B. 476.

⁸ (1877) 2 C.P.D. 357.

⁹ (1904) 1 K.B. 628. ¹⁰ (1834) 6 C. & P. 503 ; 40 R.R. p. 816.

¹¹ (1869) L.R. 4 Q.B. p. 479. See also *Gracey v. Belfast Tramway Co.* (1901) 2 Ir. R. 322. The case of *Coupé Co. v. Maddick* (1891) 2 Q.B. 413, must be taken to have been wrongly decided. See *Sanderson v. Collins*, (1904) 1 K.B. 628.

the employment of the master, so as to divest the latter of all liability; in such cases it is a question of degree, as to how far the deviation could be considered a separate journey."

Negligence at
time of em-
ployment,
but not in
course of
employment.

6. *Servant's negligence contemporaneous with his employment.*

A master is not responsible for the negligence or other wrongful act of his servant, simply because it is committed *at a time* when the servant is engaged on his master's business. It must be committed *in the course* of that business, so as to form a part of it, and not merely coincident in time with it. In *Williams v. Jones*¹² the defendant employed his servant, a carpenter, to make a signboard in a shed belonging to the plaintiff, who had allowed the use of it for this purpose. The carpenter lit his pipe while so engaged, and set the shed on fire by negligently throwing down the light used by him. It was held by the Court of Exchequer Chamber¹³ that the defendant was not liable. "It was not necessary that he should smoke in order to make the signboard, nor was the act of lighting the pipe in any way whatever for the benefit of his master or in furtherance of the object of his employment. It is said he was negligent whilst using the shed, and that in a sense is true. It seems to us, however, that in order to make the master liable, the servant must not only have been negligent in using the shed, but in using it for the purposes of his master and in the course of his employment."¹⁴ There was no negligence in making the signboard (the master's business); there was negligence only in smoking the pipe (the servant's business). The fact that the two things were coincident in time did not make them parts of a single transaction done on behalf of the master. It is true that the servant was negligent in his management and care of the shed, but he was not employed by his master to look after the shed; his master's business was the making of a signboard, not the care of the plaintiff's shed.

If, on the other hand, the fire had arisen through the act of the servant in lighting a fire to boil his glue-pot, the master would have been responsible. So, to use a former illustration, if the servant had been a carter instead of a carpenter, and

¹² (1865) 3 H. & C. 602.

¹³ Erle, C.J., Keating and Smith, J.J.,—Mellor and Blackburn, J.J., dissenting.

¹⁴ 3 H. & C. at p. 612, *per* Keating, J.

had lit his pipe while driving his master's horses, and whilst so doing he had run over the plaintiff through inattention, his master would have been responsible ; for this would have been a negligent way of driving horses, and not merely a negligent way of lighting pipes. But if, after lighting his pipe under the same circumstances, he had negligently thrown away the match, and so burned the plaintiff's crops, his master would have been free from responsibility. This would be a negligent way of smoking tobacco, but an unexceptionable way of driving horses.

7. *Permission distinguished from employment.* On the same principle a master is not responsible for the negligence of his servant, while engaged in doing something which he is *permitted* to do for his own purposes, but not *employed* to do for his master. I am liable only for what I employ my servant to do for me, not for what I allow him to do for himself. If I permit my servant for his own ends to drive my horse, I am not liable for his negligence in doing so. In this respect he is not my servant, but a mere bailee to whom I have lent my property ; and there is no more reason why I should answer for his conduct in such a matter, than why I should answer for that of my friends or my children, to whom without personal negligence on my own part I lend or intrust property that may be made the instrument of mischief. Thus in respect of *Jones v. Williams*,¹⁵ already referred to, it is submitted that even if the carpenter had been expressly permitted to smoke while doing his work, the master must have been equally free from liability, unless the act of granting such a permission were in itself an act of personal negligence on the master's part.¹⁶

Acts which servant is permitted but not employed to do.

§ 32.—The Rule of Common Employment.

1. A master is not responsible for negligent harm done by one of his servants to a fellow-servant engaged in a common

Master not responsible to his own servant for negligence of fellow servant.

¹⁵ (1865) 3 H. & C. 602.

¹⁶ In *Ruddiman v. Smith* (1889) 60 L.T. (N.S.) 208, the defendants were held liable by a Divisional Court for the act of a clerk who after office hours washed his hands in the lavatory and left the tap turned on. It is not easy to see, however, how the clerk in such circumstances could be said to be engaged on his master's business.

employment with him. His liability extends only to harm done to strangers, not to harm inflicted by one of his servants on another of them. This rule, indeed, has been to a large extent abrogated by statute—the Employers Liability Act, 1880—but this Act does not apply to all trades or to all forms of accident, and the common law principle is therefore still applicable in numerous instances. It is irrational, and it is to be regretted that the legislature has not seen fit wholly to abolish it, instead of merely establishing a series of capricious exceptions to it. It was first applied in *Priestly v. Fowler*,¹ and first definitely formulated in *Hutchinson v. York and Newcastle Rly. Co.*²

2. The reason alleged for this exemption of the employer from liability to his own servants is that a servant impliedly agrees to run the risk naturally incident to the employment undertaken by him, and that one of these risks is that of harm due to the negligence or incompetence of his fellow-servants. “When several workmen,” says Lord Cranworth,³ “engage to serve a master in a common work, they know or ought to know the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks.” The rule, that is to say, is an application of the maxim *Volenti non fit injuria*.⁴ This presumption that a servant agrees to take upon himself the risk of his fellow-servants’ negligence is, however, not a mere presumption of fact, as in other cases in which the maxim is applied; it is a presumption of law, which can be excluded by nothing less than an express agreement between master and man, by which the master foregoes the benefit of it.

3. Two conditions must be fulfilled before this rule of exemption from liability is applicable :—

(a) The servant injured and the servant causing the injury must be fellow-servants; *i.e.*, they must be servants of the same master;

¹ (1837) 3 M. & W. 1; 49 R.R. 495.

² (1850) 5 Ex. 343; 82 R.R. 697.

³ *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. 266 at p. 295.

⁴ *Supra*, p. 46.

- (b) They must at the time of the accident have been engaged in a common employment.

4. In the first place, then, they must be fellow-servants. ^{Who are fellow servants.} It is not enough that they were working together and engaged in the same transaction, unless, with respect to that transaction, they were employed by the same master. If A engages an independent contractor B, and the servants of both A and B work together at the same job, A is liable for any harm done by his servants to the servants of B, and B is similarly liable to the servants of A.⁵

Servants are fellow-servants within the meaning of this rule, even though one of them is the superior of the other.⁶ The captain of a ship is a fellow-servant with the members of his crew; the foreman of a factory with the artisans under his charge; and presumably the directors of a company with the inferior servants of the company.

The term fellow-servant also includes any person who, at the request or with the permission of a servant or his master, gratuitously and temporarily assists the servant in his work. By such assistance he puts himself *quoad hoc* in the position of a fellow-servant of the servant assisted by him, and therefore precludes himself from suing the employer for any harm resulting. Thus in *Degg v. Midland Rly. Co.*⁷ the servants of the defendant company were engaged in turning a truck on a turntable, when a stranger, noticing their difficulty in doing the work, voluntarily gave his assistance, and while doing so was crushed and killed by an engine negligently driven by another servant of the company. It was held that the defendants were under no liability.

On the other hand if the person so injured while assisting the defendant's servants is not a mere volunteer, but is engaged in forwarding some business of his own in which these servants are engaged, he is no fellow-servant of theirs, and is entitled to hold their employer responsible for their negligence towards him. Thus in *Wright v. London and N.W. Rly. Co.*⁸ the plaintiff assisted the defendants' servants to

⁵ *Johnson v. Lindsay* (1891) A.C. 371; *Cameron v. Nystrom* (1893) A.C. 308.

⁷ (1857) 1 H & N. 773.

⁶ *Hedley v. Pinkney & Sons* (1894) A.C. 222; *Wilson v. Merry* (1868) L.R. 1 H.L. Sc. 326.

⁸ (1876) 1 Q.B.D. 252.

shunt a horse-box containing a heifer belonging to him, and while so engaged he was run over by a train, and it was held that the company was liable.

In considering whether the servants concerned are servants of the same master, it is important to remember and apply the rule already explained, that one man may lend his servant to another for a particular purpose, so as to make him *quoad hoc* the servant of that other, and therefore the fellow-servant of that other's servants.⁹

Common employment.

5. The second condition requisite for the exemption of the master is that of common employment. It is not enough that the plaintiff was a fellow-servant of the person by whose fault he was injured ; it is necessary also that these two must have been engaged in common employment. It is not meant by this that their work must be identical in nature. Employments are said to be common within the meaning of this rule, when they are so connected with each other that the risk of an accident due to the conduct of one of them is a natural incident of the other, so that such risk must be deemed to have been in the contemplation of the servant when he undertook that other. This is so, for example, when two servants work at the same time and place at the same job ; as when they are engaged together in lifting heavy weights. Even, however, when they are doing entirely different work, the mere fact that they are working together at the same time and place may be sufficient to make their employment common. If an accountant is engaged to keep books in a dynamite factory, his employers will be free from liability at common law, if he is killed by an explosion due to the negligence of a fellow-servant engaged in the manufacture. Further, employments may be common even though they are conducted at different times and in different places, for they may be so connected that the safety of the one servant is committed to the care and skill of the other. The driver of a train, for example, is engaged in a common employment with the signal-man who regulates the traffic, and with the superintendent who is responsible for the repair of the line, and with the engineer whose duty it is to see that the machinery and plant are in safe condition. For he who under-

⁹ *Supra*, p. 80.

takes to drive a train knows that he is entrusting his life to the care and competence of these fellow-servants, and has impliedly taken upon himself the risk of their default. "It is necessary," says Blackburn, J., in *Morgan v. Vale of Neath Rly. Co.*,¹⁰ "that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others."

If, on the other hand, the employments are not so connected, the master is responsible even at common law for harm done by one of his servants to the other. A domestic servant engaged in the house of a shopkeeper is not engaged in a common employment with the carman who drives his master's cart. If she is run over in the street by the negligence of that carman, she will have a good cause of action against her employer; for the risk of such an accident is not a natural incident of domestic service, and the plaintiff would have been equally subject to that risk, whether she had accepted service with her employer or not. So it has been held that seamen engaged on different ships belonging to the same owner are not in common employment.¹¹

It is to be noticed further that the servant injured must have been engaged in the common employment at the time of the accident; for otherwise the risk cannot be said to have been an incident of that employment. If a conductor of an omnibus, while doing his work, is injured by the negligence of the driver, he will have no remedy against his employers; but if he is run down by the omnibus while he is crossing the street on a holiday granted to him by his employers, they will presumably be liable to him.^{12 13}

6. A master, although he is not responsible to his servant for the negligence of a fellow-servant, is yet responsible for Master liable for his own negligence.

¹⁰ (1864) 5 B. & S. at p. 580. ¹¹ *The Petrel* (1893) P. 320.

¹² See *Tunney v. Midland Rly. Co.* (1866) L.R. 1 C.P. 291; *Hutchinson v. York & Newcastle Rly. Co.* (1850) 5 Ex. p. 352.

¹³ The nature of common employment is illustrated by the following cases: *Morgan v. Vale of Neath* (1864) 5 B. & S. 570; *Hutchinson v. York etc. Rly. Co.* (1850) 5 Ex. 343, 82 R.R. 697; *Charles v. Taylor* (1878) 3 C.P.D. 492; *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. 266; *Bartonshill Coal Co. v. McQuire* (1858) 3 Macq. 300; *The Petrel* (1893) P. 320.

his own negligence; and for this purpose it is negligence to omit to use reasonable care in choosing competent and careful servants and in dismissing those who prove themselves incompetent and careless.¹⁴

Absolute liability by statute.

7. The defence of common employment is not open to an employer, when the cause of action against him is based, not on negligence, but on the breach of some absolute statutory duty independent of negligence. In *Groves v. Wimborne*¹⁵ a master was accordingly held liable for an injury suffered by one of his servants through the absence of sufficient fencing around dangerous machinery, although there was no personal negligence on the master's part, and the fencing had been wrongfully removed by one of his other servants. For the statutory duty to maintain such fencing was absolute.

§ 33.—The Employers' Liability Act, 1880.

Statutory exceptions to rule of common employment.

1. This is a temporary Act, continued from time to time, by which a number of arbitrary exceptions are made to the rule of the common law that a master is not liable to his servants for the negligence of their fellow-servants. By this Act an employer is made liable to his servants in the following five cases of personal injury :

- (1) Injury caused by a defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer, provided that the defect arises from or has not been discovered or remedied owing to the negligence of the employer or of some person in his service entrusted with the duty of seeing that these things are in proper condition (s. 1, s-s. 1; s. 2, s-s. 1).
- (2) Injury caused by negligent superintendence on the part of any servant whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour (s. 1, s-s. 2; s. 8).
- (3) Injury caused by the negligence of any servant to whose orders the servant injured was bound to conform, if the injury resulted from his having so conformed (s. 1, s-s. 3).

¹⁴ *Tarrant v. Webb* (1856) 18 C.B. 797. ¹⁵ (1898) 2 Q.B. 402.

(4) Injury caused by the act or omission of any servant in obedience to improper rules or byelaws made by the employer, or in obedience to improper instructions given by any person delegated with the authority of the employer in that behalf (s. 1, s-s. 4 ; s. 2, s-s. 2).

(5) Injury caused by the negligence of any servant having the charge or control of any signal, points, locomotive engine, or train upon a railway (s. 1, s-s. 5).

2. A servant has no cause of action even in the foregoing cases, if any of the following circumstances exist : Defences under the Act.

(a) If he knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the defect or negligence (s. 2, s-s. 3).

(b) If he has been guilty of contributory negligence—there being nothing in the Act to exclude this common law defence.¹

(c) If he has expressly or impliedly agreed to take the risk upon himself. A servant may expressly contract himself out of the Act, and he may also do so impliedly by undertaking or continuing the work with full knowledge of the danger incurred by him, under circumstances which prove as a matter of fact that he impliedly agreed to take this risk upon himself. In this case the doctrine of *Volenti non fit injuria* is applicable.²

3. No action can be brought under this Act unless notice of the injury is given to the employer within six weeks, and unless the action is commenced within six months from the accident, or in case of death then within twelve months from the death. But in the case of death want of notice is no bar, if the judge is of opinion that there was some reasonable excuse for the failure to give notice (s. 4).

¹ *Weblin v. Ballard* (1886) 17 Q.B.D. 122.

² *Supra*, p. 48 ; *Smith v. Baker* (1891) A.C. 325.

4. Every action under the Act must be commenced in the County Court, and the maximum amount recoverable is a sum equal to the estimated earnings of such a servant during the three years preceding the injury (ss. 6.3).

5. The person injured must be a workman within the meaning of the Act, and this term includes (1) railway servants, and (2) any person engaged in manual labour, other than domestic or menial servants (s. 8). To servants of other kinds the common law rule of common employment is still applicable in its full extent; for example, to an omnibus conductor, the driver of a tramcar, a shop assistant, a clerk, a seaman.³

Concurrent
liability at
common law.

6. There may be concurrent liability both under the Act and at common law; as, for example, when the master has been guilty of personal negligence, or where there is no common employment; and in these cases the common law remedy exists to its full extent, and is not cut down by the conditions and limitations of the statutory remedy.

Liability
when servant
killed.

7. When the servant is killed instead of being merely injured, the right of his relatives and representatives is based both upon the Employers' Liability Act and upon the Fatal Accidents Act.⁴ At common law there was a double defence for the master in such a case: first, the rule that the death of a person is not a cause of action (now excluded by the Fatal Accidents Act), and secondly, the rule of common employment (now excluded by the Employers' Liability Act). The claim in such a case, therefore, must conform to the requirements of both these Acts.

§ 34.—The Workmen's Compensation Act, 1906.

By this Act employers have been made, in the cases to which it extends, the insurers of their servants against accidental injuries and death. This obligation of compensation

³ *Morgan v. London General Omnibus Co.* (1884) 13 Q.B.D. 832; *Cook v. Metropolitan Tramways Co.* (1887) 18 Q.B.D. 683; *Hunt v. Gt. N. Ry. Co.* (1891) 1 Q.B. 601; *Yarmouth v. France* (1887) 19 Q.B.D. 647; *Bound v. Lawrence* (1892) 1 Q.B. 226.

⁴ *Infra*, Ch. XI.

is independent of any negligence on the part of employers or fellow-servants, and in strictness it stands outside the law of torts altogether. It is a statutory term of the contract of service, and one which, speaking generally, cannot be excluded even by express agreement. The quasi-contractual liability thus created may be concurrent with delictal liability either at common law or under the Employers' Liability Act; and in such cases the servant may elect between the various remedies available for him.¹

¹ Workmen's Compensation Act, 1906, s. 1 (2) b. and s. 1 (4).

CHAPTER III.

JUDICIAL REMEDIES.

§ 85.—Classes of Remedies for Torts.

Remedies
judicial and
extra-
judicial.

1. Remedies for torts are of two kinds, being either judicial or extrajudicial—remedies by way of an action at law, and remedies by way of self-help. The various forms of extrajudicial remedy, such as distress, the retaking of property, and the abatement of a nuisance, will be considered in the next following chapter, and we are here concerned with the other class alone.

Damages.

2. The remedies obtainable for a tort by means of an action at law are of three chief kinds : (1) damages, (2) injunction, and (3) specific restitution of property. The first of these is the ordinary and essential remedy ; it is available as of right in all cases of tort. As we have already seen, a civil injury for which an action for damages will not lie is not to be classed as a tort, whatever other forms of process may be available.

Injunction.

3. An injunction is the order of a court of justice, directing the defendant to abstain from the commission, continuance, or repetition of an unlawful act, or to do some act which he is legally bound to do—such an order being enforced by imprisonment (by way of attachment or committal for contempt) in case of disobedience. Injunction is a precautionary remedy against impending injury, damages are a remedy for an injury already suffered. Injunction is supplementary to the ordinary and essential remedy of damages, and is granted in the discretion of the Court in cases in which damages would not amount to adequate redress. Thus in the case of a continuing nuisance the plaintiff can obtain not merely damages for the injury already suffered, but also an injunction to prevent the continuance of it in the future.

4. The third form of judicial remedy is the specific restitution of property. He who is wrongfully dispossessed of his land, for example, is entitled to recover not the value of the land as damages, but the land itself; and a judgment in his favour will be executed by force if need be.¹ So in the case of chattels wrongfully taken or detained the owner has the option of claiming either their value as damages, or specific restitution of possession.² This remedy of specific restitution is obviously very similar to that of injunction, but differs from it in two ways: (a) in its historical origin, injunction being a purely equitable remedy, available originally only in the Court of Chancery, while specific restitution was a remedy granted by the courts of common law; (b) in its mode of execution, injunction being enforced by imprisonment for disobedience, while specific restitution is enforced by the forcible seizure of the property and its restoration to the plaintiff.

§ 36.—Damages.

1. The damages obtainable in an action of tort are of three kinds, distinguished as Ordinary, Nominal, and Vindictive. Ordinary damages are a sum of money awarded as compensation for the actual loss suffered by the plaintiff by reason of the injury complained of. Certain general principles which determine the amount of this compensation—the measure of damages—will be considered by us in a later part of this chapter; rules which relate merely to particular kinds of torts will be dealt with subsequently in the appropriate connection.

2. Nominal damages are a small sum of money, such as a shilling or forty shillings, awarded not by way of compensation for any actual or proved loss, but merely as a recognition of the existence of some legal right vested in the plaintiff and violated by the defendant.³ Such damages can be ob-

¹ The plaintiff in such cases recovers not only the land itself, but also damages for the loss suffered by him during the period of his dispossession (*mesne profits*), and it is by virtue of this right to damages that the wrongful dispossession of land is correctly classed as a tort.

² As to specific recovery of land, see Chapter VI. on Dispossession; and as to the specific recovery of chattels, see Chapter X. on Conversion.

³ *The Mediana* (1900) A.C. p. 116, *per* Lord Halsbury.

tained only in the case of those torts which are actionable *per se*, that is to say, without proof of actual damage. A trespass to land, for example, is in itself an actionable wrong, even though it does no harm; a plaintiff therefore must succeed in his action for damages, even though he shows no loss for which damages can be required as compensation. In such a case he will recover nominal damages. Such damages are the outcome of the recognition by the law of *injuria sine damno*. If, on the other hand, actual loss is proved, compensation awarded for that loss is not to be deemed nominal damages, however small the loss may be.

Vindictive
damages.

3. Vindictive damages (otherwise called exemplary) are a sum of money awarded in excess of any material loss actually suffered by the plaintiff, but by way of *solatium* for any insult or other outrage to his feelings that is involved in the injury complained of. Thus an assault may do a man no physical harm whatever (it may amount, for example, to a mere threat of violence), yet if it is committed in such a manner or in such circumstances as to be a grave attack upon the dignity of the plaintiff, he may recover very substantial damages for it. So a trespass to land may be committed with such insolent defiance of the rights of the plaintiff, that a jury will be justified in awarding heavy damages, although no actual loss is proved. So in an action by a father for the seduction of his daughter, the only actual loss which gives him a right of action is, as we shall see, the loss of his daughter's services; yet damages are not limited to the amount of this loss, but are awarded vindictively in respect of the injury to his parental feelings and personal dignity. Vindictive damages, therefore, are given only in cases of conscious wrongdoing in contumelious disregard of another's rights. It is often said that such damages are awarded not by way of compensation for the plaintiff, but by way of punishment for the defendant. It seems more accurate, however, to regard them as a *solatium* for wounded dignity and feelings: as a remedy for *injuria*, in the sense in which Roman lawyers used that term. Wilful wrongdoing not amounting to *injuria* in this sense—for example, the wrongful detention of property—is no ground for vindictive dam-

ages ; neither is any evidence admissible as to the means of the defendant, for the purpose of increasing or diminishing the damages to be awarded.^{4 5}

§ 37.—Remoteness of Damage.

1. Even when the defendant has committed a wrongful act (whether wilful, negligent, or of absolute liability) he is not responsible for all damage that is caused by it, but only for

A wrongdoer not liable for all damage caused by his act.

(a) damage which he intended, and

(b) damage which is the natural and probable consequence of the wrongful act.

All other damage is said to be too remote. We have already seen that the law does not adopt the principle that a man acts at his peril and must pay compensation for all damage which in fact results from his actions, even by way of inevitable accident. Nevertheless it might be supposed that in the case of *illegal* acts the rule would be different, and that he who wilfully, negligently, or otherwise, breaks the law should do so at his peril, and should be responsible for all damage which he actually causes thereby to other persons. Yet it is not so. Responsibility for wrongful acts is not unlimited, but is confined by the present rule as to remoteness of damage to certain forms of resulting harm.¹

2. This rule of limited liability does not apply to those wrongs only which depend upon the existence of wrongful intent or negligence, but applies equally to those exceptional instances of absolute liability in which *mens rea* is not required. Thus he who keeps cattle is absolutely liable if they escape from his custody and trespass on another's land ; yet he is not liable for all the damage which they may do while so trespassing, but only for that which is not too remote within the meaning of the foregoing rule.²

⁴ *Keyse v. Keyse* (1886) 11 P.D. 100 ; *Hodsoll v. Taylor* (1873) L.R. 9 Q.B. 79.

⁵ For instances of the award of vindictive damages, see *Merest v. Harvey* (1814) 5 Taunt. 442, 15 R.R. 548 ; *Sears v. Lyons* (1818) 2 Stark. 317, 20 R.R. 688 ; *Emblen v. Myers* (1860) 6 H. & N. 54 ; *Huckle v. Money* (1763) 2 Wils. 205 ; *Tullidge v. Wade* (1769) 3 Wils. 18 ; *Bell v. Midland Rly. Co.* (1861) 10 C.B. (N.S.) 287.

¹ *Sharp v. Powell* (1872) L.R. 7 C.P. 253.

² *Cox v. Burbidge* (1863) 13 C.B. (N.S.) 430 ; *Sanders v. Teape* (1884) 51 L.T. (N.S.) 263.

3. When the wrongful act of the defendant is actionable *per se*, the rule of remoteness determines the *measure* of liability, though not the *existence* of it. When on the other hand the wrong is not actionable without proof of actual damage, the rule of remoteness determines not merely the measure of damages, but also the existence of the cause of action. If all the damage proved is too remote, the defendant is under no liability at all.

When is
damage too
remote?

4. Damage is too remote, if it is neither the *intended* nor the *natural and probable* result of the wrongful act. Every man is responsible for damage which he intended to result and which did result from his wrongful act, however improbable it may have been. Every man is also liable for the natural and probable results of his wrongful act, even though not intended by him. But no man is liable for consequences neither intended nor probable.³

5. Damage is said to be natural and probable, when it is so likely to result from the defendant's act, that a reasonable man in the circumstances of the defendant and with the defendant's knowledge and means of knowledge would have foreseen and avoided it. "No doubt," says Bovill, C.J., in *Sharp v. Powell*,⁴ "one who commits a wrongful act is responsible

³ It is sometimes said that a person is presumed in law to intend the natural and probable results of his acts. (See *R. v. Harvey* (1823) 2 B. & C. p. 264, 26 R.R. p. 343.) Such a form of statement, however, is useless and misleading. So far as it is true at all, it is simply an improper way of saying that a person is responsible for the natural and probable consequences of his acts, whether he intended them or not. Commonly it makes no difference whether a consequence was intended or not, provided that it was natural and probable; for the same liability exists in each case. But there are exceptional instances (many of them in the criminal law, and some also in the law of torts) in which the distinction becomes important—a defendant being liable for intended consequences but not for others. In such cases the alleged presumption does not exist, and in all other cases it is unnecessary.

The only constructive intent really known to the law is in those branches of the criminal law in which conscious negligence amounting to reckless disregard of consequences is imputed to the defendant as an intention to produce these consequences; as in the case of murder, and malicious injury to person or property. See p. 16, n. 4 above. In other cases the probability of a consequence may be evidence that it was intended, but there is no legal presumption to that effect, either rebuttable or conclusive. ⁴ (1872) L.R. 7 C.P. p. 258.

for the ordinary consequences which are likely to result therefrom, but generally speaking he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shewn that he knows or has reasonable means of knowing that consequences not usually resulting from the act are by reason of some existing cause likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists as to render the damage probable, if injury does result to a third person, it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action." So in *Greenland v. Chaplin*⁵ Pollock C.B., suggests as the true rule "that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." So in *Lynch v. Knight*⁶ Lord Wensleydale says: "To make words actionable by reason of special damage the consequence must be such as . . . might fairly and reasonably have been anticipated and feared would follow."

6. The rule as to remoteness of damage is in truth merely a special application of the general requirement of *mens rea* as a condition of liability in tort. No one is to be held liable for any damage except that which he intended to do or might have foreseen and avoided by due care. The same principle which determines whether the defendant has committed any wrongful act at all, determines also, in cases where a wrongful act has been committed, the limit of his responsibility for the consequences of it.

This explanation is not inconsistent with the fact that in cases of absolute liability, in which the requirement of *mens rea* does not exist, the rule as to remoteness of damage is still applicable. A person is held absolutely liable for a certain event, for example the trespasses of his cattle, but he is not liable for the consequences of that event,

⁵ (1850) 5 Ex. p. 248; 82 R.R. p. 659. ⁶ (1861) 9 H.L.C. p. 600.

⁷ See also Pollock on Torts, p. 30, 7th ed.

unless they are natural and probable, *i.e.*, unless they are of such a nature that they would be anticipated by a reasonably careful person as likely to ensue from such an event.

The question of negligence and that of remoteness of damage are therefore essentially the same, and where the cause of action is itself based on negligence, it is not always easy to keep them distinct. This being so, it is not surprising to find a certain amount of confusion in the books, and it is often difficult to determine whether the real question in a decided case is one as to the sufficiency of the proof of negligence or one as to the remoteness of damage. There is never any genuine question of remoteness, unless it is first proved or admitted that the defendant has committed some wrongful act (whether one of negligence or not), and the question then arises whether the resulting damage or some particular portion of it is sufficiently connected with that act. Thus when the defendant driving a carriage runs over the plaintiff and breaks his leg, the question is one as to the sufficient proof of negligence, and not one of remoteness of damage. But when the defendant, by his proved or admitted negligent driving, has put the plaintiff in such danger that in endeavouring to escape he is run down and injured by another vehicle, the driver of which is also negligent, the question is no longer one as to the negligence of the defendant, but one as to the remoteness of the damage.

These two questions are generically the same, though specifically different, and they are to be answered by the application of the same fundamental principle, *viz.*, by the comparison of the defendant's conduct with that of an ordinarily reasonable and careful man. The essential question, in each case is what would such a person have known and foreseen and done, had he been placed in the same circumstances as the defendant.

Other explanations of the rule of remoteness.

7. Attempts have sometimes been made to explain the rule of remoteness of damage as based on a distinction between different kinds of causes or modes of causation. Thus it has been said that the wrongful act of the defendant must be the *causa proxima* of the damage, and not merely the *causa remota*. Similarly we find a distinction drawn between *causa causans* and *causa sine qua non*, or between cause and occa-

sion, or between direct and indirect cause.⁸ At other times we find that the test adopted is the existence of an uninterrupted chain of causation, and the liability of the defendant is said to extend to all consequences which his act produces, until the chain of causation is broken by the intervention of some new and independent activity.⁹ None of these attempted explanations seems to possess any logical or legal validity. The only material and comprehensible difference between one consequence and another is a difference in probability, and the only practicable measure of the requisite degree of probability is to be found in the knowledge and foresight of a reasonably careful or prudent man.

8. Damage may be natural and probable, although one of the intervening links in the chain of causation may be extremely improbable. For if it is likely that the damage will happen in some way, it makes no difference that the way in which it does actually happen is an unlikely one. "If a man," says Kennedy, J., in *Dulieu v. White*,¹⁰ "is negligently run over or otherwise injured in his body, it is no answer to the sufferer's claim for damages, that he would have suffered less injury or no injury at all, if he had not had an unusually thin skull or an unusually weak heart." For it is sufficiently probable in itself that a man run over in the street will suffer from a fractured skull or come to his death, and the fact is irrelevant that in this particular case the event was induced by a very improbable circumstance. But on the contrary, if I unlawfully but without violence lay my hand on another's shoulder, and by reason of heart disease he is killed by the start which he so receives, it is submitted that his death is damage too remote, and that I am not civilly liable for it. For here it is not merely the means but the end itself which is improbable.

⁸ In *Bailiffs of Romney Marsh v. Trinity House* (1870) L.R. 5 Ex. p. 208, Kelly, C.B., says: "The rule of law is that negligence to render the defendants liable must be the *causa causans*, or the proximate cause of the injury, and not merely a *causa sine qua non*." In *Sneesby v. L. & Y. Rly. Co.* (1874) L.R. 9 Q.B. p. 268, Quain, J., says: "In tort the defendant is liable for all the consequences of his illegal act, where they are not so remote as to have no direct connection with the act, as by the lapse of time, for instance."

⁹ Beven on Negligence, I, p. 100, 2nd ed. ¹⁰ (1901) 2 K.B. p. 679.

Alternative forms of damage.

9. Damage may be very improbable in itself, and yet be only one of a large number of alternative forms of damage, one or other of which is certain or likely to happen; and in such a case all of these alternatives, by reason of the fact that they are alternatives, are sufficiently natural and probable to be a ground of liability. If I throw a stone into a crowd of a thousand persons, the chances are a thousand to one against hitting any particular individual, yet in an action brought by one whom I did hit, I could not raise the defence of remoteness of damage.

Functions of judge and jury in questions of remoteness.

10. Whether the damage complained of was the intended or natural and probable result of the defendant's act is a question of fact for the jury, but whether there is any reasonable evidence of its being so is a preliminary question of law for the judge. It is for the judge to decide whether the damage is such as could reasonably be held by a jury to be the natural and probable consequence of the defendant's act. If he holds that it is not, he must either withdraw the case from the jury altogether, or direct them as a matter of law that the damage in question is too remote to be taken into account in estimating damages.¹¹ If, on the other hand he holds that there is reasonable evidence to go to the jury that the damage was the natural and probable result of the defendant's act, he must leave the question to them as one of fact, and they are at liberty to find either that it was or was not such a consequence, and to determine the existence or the extent of the defendant's liability accordingly. It is not the function of the judge to decide the question of fact whether the damage was or was not an intended or a natural and probable consequence, any more than it is his function to decide whether the conduct of the defendant was or was not negligent. "I think," says Bovill, C.J., in *Smith v. London & S.W. Rly. Co.*¹² "it is impossible to say that there

¹¹ Where damage is essential to the cause of action, and the only damage alleged is on the face of the pleadings too remote in law (that is to say, not fit to be left to a jury) the objection of remoteness may be taken as a point of law arising out of the pleadings, and judgment given for the defendant. Otherwise the case must go to trial. *Cobb v. Gl. W. Rly. Co.* (1893) 1 Q.B. 459; *Speake v. Hughes* (1904) 1 K.B. 138.

¹² (1870) L.R. 5 C.P. at p. 107.

was not evidence from which a jury might be justified in concluding that there was negligence as regards the plaintiff, and that the destruction of the cottage in which the plaintiff's goods were was the natural consequence of their negligence. What the defendants' servants ought as reasonable men to have contemplated as the result of leaving the cuttings and trimmings where and as they did, must depend upon all the circumstances. It is not, however, for us to decide whether the injury complained of was a probable consequence of the conduct of the defendants' servants. It is enough for us to say that there was evidence for the jury; and they having found for the plaintiff, we cannot interfere."

To put the matter in another way, we may say that damage may be too remote either in law or fact. It is too remote in law, if it is so remote that no reasonable jury could honestly hold that it was the natural and probable result of the defendant's act, and in such a case the judge must give judgment for the defendant, or direct the jury as a matter of law to take no account of that head of damage. On the other hand, it is too remote in fact, when the jury is of opinion on the case being submitted to them that it was not the natural and probable result of the defendant's act. If the damage is too remote either in law or fact, the plaintiff cannot recover.

11. The following illustrative cases exhibit the operation of the law on this matter : Illustrative cases.

*Cobb v. Gl. W. Rly. Co.*¹³ The defendant company was guilty of negligence in allowing a railway carriage to be overcrowded, in consequence of which the plaintiff, a passenger, was hustled and robbed. This damage was held to be too remote in law, for the only natural result of overcrowding is inconvenience to passengers, not robbery.

*Speake v. Hughes.*¹⁴ An action of slander was brought in respect of a statement made to the plaintiff's employer, that the plaintiff had removed from his house without paying arrears of rent to his landlord, in consequence of which statement the plaintiff had been dismissed from his employment. The damage was held too remote in law.

*Hoey v. Felton.*¹⁵ This was an action for false imprisonment

¹³ (1893) 1 Q.B. 459; 1894 A.C. 419.

¹⁴ (1904) 1 K.B. 138.

¹⁵ (1861) 11 C.B. (N.S.) 142.

ment. The plaintiff, a workman, had been illegally arrested and confined for a few hours, whereby he became ill, and was unable to go to his work until the next day, and owing to his absence his place was filled up by his employer, and he lost his employment. The damage was held too remote in law.

*Glover v. London & S.W. Rly. Co.*¹⁶ The company's servants illegally ejected the plaintiff from a railway carriage, whereby he lost a pair of opera-glasses which he left behind him in the carriage. The loss of the glasses was held to be a consequence too remote in law.

*Sharp v. Powell.*¹⁷ The defendant, in breach of a statutory prohibition, washed his van in a public street, and allowed the water to run along the gutter. Owing to a severe frost the entrance to the sewer, down which the water would otherwise have run, was obstructed by ice, and the water spread over the street and there froze, and the plaintiff's horse fell upon it and was injured. The defendant had no knowledge of the danger thus created by him. It was held that the damage was too remote in law.¹⁸

*Clark v. Chambers.*¹⁹ The defendant illegally obstructed a highway by placing in it a horizontal bar armed with iron spikes. Some third person, desiring to pass along the road, removed the obstruction and negligently placed it in an upright position on the footpath. The plaintiff, walking there on a dark night, came into contact with the obstruction, and one of the spikes entered his eye. The damage was held to be not too remote in law, notwithstanding the fact that an intervening link in the chain of causation was the negligent act of a third person.

*Smith v. London & S.W. Rly. Co.*²⁰ The servants of the defendant company, during exceptionally dry weather, cut the grass and hedges along the line, and left the cuttings lying there in heaps for a fortnight. A spark from a passing

¹⁶ (1867) L.R. 3 Q.B. 25.

¹⁷ (1872) L.R. 7 C.P. 253.

¹⁸ It may perhaps be doubted whether in this case the court did not take too narrow a view of the matter. That water discharged into the street in a bitter frost should freeze there would scarcely seem to be such an unprecedented occurrence that no jury should be allowed to find a defendant to blame for it.

¹⁹ (1878) 3 Q.B. D. 327.

²⁰ (1870) L.R. 5 C.P. 98; 6 C.P. 14.

train ignited these cuttings, and a high wind sprang up and carried the fire across a stubble field and a public road to the plaintiff's cottage, situated 200 yards from the railway. It was held by the Court of Common Pleas that the damage was not too remote.²¹

*Burrows v. March Gas Co.*²² The defendant company negligently allowed gas to leak from a gas-pipe fitted up by them in the plaintiff's shop, and a gasfitter employed by the plaintiff to repair the leak negligently approached it with a lighted candle in his hand, whereupon an explosion occurred, which damaged the plaintiff's property. It was held that the plaintiff had a good cause of action against the gas-company.

*Halestrap v. Gregory.*²³ The plaintiff's mare, entrusted to the defendant, escaped by the latter's negligence from the field in which it was, into an adjoining field occupied by certain cricketers. The cricketers attempted to drive it back through the gate into its own field, and in endeavouring to avoid this compulsory return it ran against a wire fence surrounding the field, and was injured. It was held that this damage was not too remote a consequence of the defendant's negligence in allowing the mare to escape.²⁴

13. Damage is not necessarily too remote in law merely because the wrongful act of some third person has intervened as one of the links in the chain of causation between the wrongful act of the defendant and the damage in question. If A is guilty of negligence and so causes harm to B, it is no defence that the harm would not have happened had not C been negligent also ; and this is so, whether the negligence

Intervening
act of third
person.

²¹ On appeal to the Court of Exchequer Chamber (L.R. 6 C.P. 14), this decision was affirmed, but the reasons given by Channell, J., and Blackburn, J., are, it is submitted, such as would, if correct, eliminate the doctrine of remoteness of damage altogether. "When it has been once determined," says Channell, J., "that there is evidence of negligence, the person guilty of it is equally liable for its consequences whether he could have foreseen them or not."

²² (1872) L.R. 7 Ex. 96.

²³ (1895) 1 Q.B. 561.

²⁴ For other authorities on remoteness, see *M'Mahon v. Field* (1881) 7 Q.B.D. 591 ; *Hobbs v. London & S.W. Rly. Co.* (1875) L.R. 10 Q.B. 111 (*sed qu.*) ; *Bailiffs of Romney Marsh v. Trinity House* (1870) L.R. 5 Ex. 208, 7 Ex. 247 ; *Sneesby v. L. & Y. Rly. Co.* (1874) L.R. 9 Q.B. 263, 1 Q.B.D. 42.

of C is earlier or later than that of B, or simultaneous with it. In other words, the contributory negligence of a third person is no defence. An example of the rule is a collision between two vehicles, due to the combined negligence of both drivers, and causing damage to a passenger in one of these vehicles. He has a good cause of action against either of the drivers.²⁶ It will be noticed that several of the illustrative cases already cited as to remoteness of damage in general are examples of the present rule. In *Clark v. Chambers*,²⁶ and *Burrows v. March Gas Co.*²⁷ it was no defence that the damage would not have happened had not some third person been guilty of negligence also.

Does the same rule apply when the intervening and contributory act of the third person is not a mere act of negligence but one of wilful wrongdoing? There seems no reason in principle why it should not. It cannot be laid down as a matter of law that damage caused by the wilful wrongdoing of a third person can never be the natural and probable result of a wrongful act done by the defendant. If by reason of a false and malicious libel published by A in reference to B, B is assaulted by C, it may very well be that this result was natural and probable in fact, and there is no reason why it should be deemed too remote in law.²⁸

Exceptions
to rule of re-
moteness.

14. The rule as to remoteness of damage has no application to those cases in which a defendant has wrongfully taken possession of or otherwise dealt with property, in such a manner that it is now at his risk. In such a case he is responsible for any resulting loss, destruction, or damage of that chattel, however remote that consequence may be. Thus in *Hiorl v. Bott*²⁹ the defendant wrongly delivered the plaintiff's goods to a third person, to be taken back to the plaintiff, and was held responsible for their misappropriation by the person to whom he so delivered them.

²⁵ *The Bernina* (1888) 13 A.C. 1.

²⁶ (1878) 3 Q.B.D. 327.

²⁷ (1872) L.R. 7 Ex. 96.

²⁸ See *Lynch v. Knight* (1861) 9 H.L.C. at p. 600, *per* Lord Wensleydale; *Bowen v. Hall* (1881) 6 Q.B.D. p. 338, *per* Brett, L.J. Cf., however, *Vicars v. Wilcocks* (1806) 8 East 1; 9 R.R. 361.

²⁹ (1874) L.R. 9 Ex. 86.

So in *Lilley v. Doubleday*,³⁰ a bailee, who ought by the terms of his contract to have kept the goods in one building, kept them in another, which was burned down; and he was held liable for the destruction of the goods, although the one building was as safe as the other. So by the Sale of Goods Act, 1893, sec. 20, a vendor who is guilty of delay in delivering the chattel after the property in it has passed to the buyer, keeps it at his own risk, and is responsible for any loss, however improbable, unless it certainly would have happened in any event.

§ 38.—Successive Actions on the Same Facts.

1. More than one action will not lie on the same cause of action; therefore all damages resulting from the same cause of action must be recovered at one and the same time. The rule is designed to prevent the oppressive and vexatious litigation that might result, if an injured person were at liberty to divide his claim and sue in successive actions for different portions of the loss sustained from a single cause of action.

All damage from same cause of action must be recovered in one action.

Thus in *Fitter v. Veal*¹ a plaintiff, after recovering damages for an assault and battery, discovered that his injuries were more serious than was at first supposed, and he found it necessary to submit to a surgical operation; whereupon he brought a second action for the additional damage. But it was held that he had only one cause of action, which had been wholly extinguished by the judgment recovered in the first action. On the same principle judgment recovered during an injured person's lifetime is a bar to a subsequent action by his representatives under the Fatal Accidents Act, if he dies of the injury.² Similarly an action by a master for injury to his servant, *per quod servitium amisit*, is a bar to any further action by the master for a continuance of that loss of service due to the same injury.³

³⁰ (1881) 7 Q.B.D. 510. See also *Davis v. Garrett* (1830) 6 Bing. 716; 31 R.R. 524.

¹ (1701) 12 Mod. 542.

² *Read v. Great E. Rly. Co.* (1868) L.R. 3 Q.B. 555.

³ *Hodsoll v. Stallebras* (1840) 11 A. & E. 301; 52 R.R. 350.

2. The application of this rule is not excluded or affected by any of the following facts :

- (a) That the damage in respect of which the second action is brought had not accrued when the first action was brought.⁴
- (b) That it was unknown to the plaintiff when he brought the first action.⁵
- (c) That the act complained of is not actionable *per se*, but only on proof of actual damage. Thus the rule applies to injury by negligence, no less than to assault or trespass,⁶ and to slander actionable only on proof of damage, no less than to libel.⁶

Aliter when
two causes of
action.

3. Where, however, there are two distinct causes of action, and not merely two distinct heads of damage, successive actions will lie in respect of each of them. This happens in at least three classes of cases :

- (a) When the same act amounts to a violation of two or more distinct rights ;
- (b) When the defendant has committed two or more distinct acts, even though in violation of the same right ;
- (c) When the cause of action is a continuing one.

4. When the wrongful act of the defendant has violated two distinct rights vested in the plaintiff, a separate action will lie to recover the damage suffered in respect of each of these rights. Thus in *Brunsdon v. Humphrey*⁸ the plaintiff, a cab-driver, having already recovered compensation in the county court for damage done to his cab by a collision with the defendant's van, was held entitled by a majority of the Court of Appeal to bring a second action in the High Court in respect of personal injuries suffered by him in consequence of the same accident. "The collision," says Brett, M.R.,⁹ "with the defendant's van did not give rise to only one cause of action ; the plaintiff sustained bodily injuries, he was injured in a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action

⁴ *Fitter v. Veal* (1701) 12 Mod. 542 ; *Read v. Great E. Rly. Co.* (1868) L.R. 3 Q.B. 555.

⁵ *Read v. Gt. E. Rly. Co.* (1868) L.R. 3 Q.B. 555.

⁶ *Per* Holt, C.J., in *Fitter v. Veal*, 12 Mod. p. 544.

⁸ (1884) 14 Q.B.D. 141.

⁹ *Ibid.* at p. 145.

in respect of the damage to his goods." So also in *Gibbs v. Cruikshank*¹⁰ the defendant illegally entered the plaintiff's premises and there seized his goods, and it was held that an action for the seizure of the goods was no bar to a subsequent action for the trespass to the land. So in *Guest v. Warren*¹¹ it was held that an action for malicious prosecution would lie, notwithstanding a previous action in which damages had been recovered for a false imprisonment arising out of the same transaction.

To justify two actions, however, there must be two distinct rights violated; it is not enough that the same act amounts to two distinct violations of the same right. Thus separate actions will not lie for two different personal injuries received from the same act of negligence or assault: as when the plaintiff has his leg broken and also his arm.¹² Nor can a plaintiff bring successive actions in respect of distinct attacks made upon his reputation in a single document.¹³

5. So also two actions will lie when the defendant has committed two distinct wrongful acts, even against the same person in violation of the same right. Thus if he has on two different occasions entered upon the plaintiff's land, the plaintiff is not bound to sue for both these trespasses at once, but may bring separate actions for each of them. On the same principle, if the same libellous statement is published to two or more persons at different times, a separate action will lie for each publication.¹⁴

6. When the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued.

An injury is said to be a continuing one, so long as it is still in the course of being committed and is not wholly past.

¹⁰ (1873) L.R. 8 C.P. 454.

¹¹ (1854) 9 Ex. 379.

¹² *Ibid.*, per Bowen, L.J., at p. 148; *Macdougall v. Knight* (1890) 25 Q.B.D. p. 8, per Lord Esher.

¹³ *Macdougall v. Knight* (1890) 25 Q.B.D. 1.

¹⁴ Any vexatious or oppressive exercise of this right of suing separately for a number of acts of the same kind will be restrained by the court in the exercise of its discretionary power to prevent the abuse of legal process. *Brunsdon v. Humphrey* (1884) 14 Q.B.D. p. 151, per Bowen, L.J.; *Macdougall v. Knight* (1890) 25 Q.B.D. 1.

Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement ; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land ; and a trespass continues so long as the defendant remains present upon the plaintiff's land. So also a trespass by placing things wrongfully upon another's land continues until these things are removed.¹⁵

7. In the case of such a continuing injury an action may be brought during its continuance, but damages are recoverable only up to the time of their assessment in the action.¹⁶ Prospective damages for any further continuance of the injury are not recoverable by way of anticipation, for *non constat* that the defendant will not discontinue the wrong forthwith. This is so, however permanent the source of the mischief may be, and however improbable it may be that the defendant will discontinue it : as when he has built a house which blocks the ancient lights of the plaintiff. There will be time enough to sue for future damage when it accrues.

Thus in *Mitchell v. Darley Main Colliery Co.*¹⁷ it was held by the House of Lords that in an action for the withdrawal of support from land by means of excavation damages were recoverable only for subsidence and damage that had actually happened at the date of action, and not for prospective subsidence and damage in the future, however probable or even certain.¹⁸

8. It has been held, however, by a majority of the Court of Appeal that if the known probability of the future continuance of the injury has diminished the present saleable value of the property affected by it, this diminution of value is a present and accrued damage which may be now recovered ; and when the apprehended continuance has actually taken place, a second action may be brought for the new damage

¹⁵ *Bowyer v. Cook*, (1847) 4 C.B. 236.

¹⁶ Order XXXVI, r. 58 : "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment." See *Hole v. Chard Union* (1894) 1 Ch. 293.

¹⁷ (1884) 14 Q.B.D. 125 ; 11 A.C. 127.

¹⁸ See also *Battishill v. Reed*, (1856) 18 C.B. 696.

occasioned by it.¹⁹ Thus if a wrongful excavation of minerals causes a subsidence, and threatens to cause a further subsidence in the future, the measure of damages in the first action is the present reduction in the value of the land, taking into account the diminution due to fear of further subsidence; and if a further subsidence does happen, the further reduction in the value of the land may be recovered in a second action.

9. If the continuing injury is actionable *per se*, as in the case of trespass, or if it is the cause of fresh damage from day to day, as in the case of an obstruction of ancient lights, successive actions will lie *de die in diem*, until the defendant chooses to relieve himself from this burden of litigation by discontinuing his wrong. If, on the other hand, a continuing injury is of a kind which is actionable only on proof of actual damage, and the damage caused is intermittent, as in the case of withdrawal of support, a new action will lie only when some new damage accrues. Thus in *Shadwell v. Hutchinson*²⁰ it was held that successive actions would lie for an obstruction of the plaintiff's window caused by the defendant's building. So in *Battishill v. Reed*²¹ it is said: "Where an action has been brought for erecting and leaving a building on the plaintiff's land, a fresh action will lie for continuing it there, and action after action may be brought until it is removed." Accordingly in *Bowyer v. Cook*²² the plaintiff first sued the defendant for placing certain stakes upon his (the plaintiff's) land, and then successfully sued him a second time for leaving them there.²³

10. A continuing injury to property is actionable at the suit of a plaintiff whose title did not accrue until after the commencement of the injury, and such a plaintiff may recover

¹⁹ *Tunncliffe v. West Leigh Colliery Co.* (1906) 2 Ch. 22 (distinguishing *Rust v. Victoria Graving Dock Co.* (1887) 36 Ch.D. 113), *per* Collins, M.R., and Cozens-Hardy, L.J., Romer, L.J., dissenting. *Sed qu.* What if, without any actual subsidence, the fear of one has caused a diminution in the saleable value of the property? Is this a present cause of action?

²⁰ (1831) 2 B. & Ad. 97; 36 R.R. 497.

²¹ (1856) 18 C.B. p. 716.

²² (1847) 4 C.B. 236.

²³ See also *Crumbie v. Wallsend Local Board* (1891) 1 Q.B. 503; *Thompson v. Gibson* (1841) 7 M. & W. 456, 56 R.R. 762; *Whitehouse v. Fellowes* (1861) 10 C.B. (N.S.) 765.

damages in respect of the continuance of the act since the accrual of his title. Thus he who buys land may sue for a continuing trespass or nuisance which existed at the time of his purchase.²⁴

Damages in lieu of injunction include future damage.

11. Notwithstanding the foregoing rules as to the measure of damages in continuing injuries, when an action is brought for an injunction against such an injury, and damages are given in substitution for an injunction in pursuance of the court's discretionary powers in that behalf, such damages are given in full satisfaction for all future damage which may arise from a continuance of the injury complained of, and therefore no subsequent action will lie in respect thereof. By Lord Cairns' Act²⁵ discretionary jurisdiction was conferred upon the Court of Chancery, in all cases in which it had power to grant an injunction, to award damages "either in addition to or in substitution for such injunction." Although this Act is now repealed, the jurisdiction so created is still retained.²⁶ Damages so given in substitution for an injunction have reference to the future, and not to the past merely, and they therefore amount to the legalisation of the further continuance of the act complained of—a purchase by the defendant of the right to go on doing it.²⁷

Accord and satisfaction.

12. The operation of accord and satisfaction in barring a subsequent action for further damages is the same as that of a judgment in a prior action, unless it is proved that the intention of the parties was the contrary. An accord and satisfaction is a destruction of the cause of action, just as a judgment is, and therefore it is equally a bar to any later action founded on the same cause of action, even though for further damage. Thus in *Read v. Great Eastern Rly. Co.*²⁸ a person injured by the negligence of a railway company received compensation from them in his lifetime, but subsequently died of his injuries; and it was held that his executors had no cause of action under the Fatal Accidents Act.

²⁴ *Hudson v. Nicholson* (1839) 5 M. & W. 437.

²⁵ 21 & 22 Vict. c. 27. s. 2.

²⁶ 46 & 47 Vict. c. 49. s. 5.

²⁷ *Fritz v. Hobson* (1880) 14 Ch.D. p. 548; *Chapman Morsons & Co. v. Auckland Union* (1889) 23 Q.B.D. p. 298; *Holland v. Worley* (1884) 26 Ch. D. 578; *Dreyfus v. Peruvian Guano Co.* (1889) 43 Ch. D. p. 342; *Martin v. Price* (1894) 1 Ch. 276.

²⁸ (1868) L.R. 3 Q.B. 555.

Yet if it can be shown that the real agreement between the parties was not to destroy the whole cause of action, but merely to pay and receive compensation for the damage accrued up to that time, that agreement will be effective, and an action will lie for any further damage.²⁹

§ 39.—Injunctions.

1. Injunctions are of two kinds, being either prohibitory or mandatory. A prohibitory injunction is an order restraining the defendant from committing or repeating an injurious act: for example, a trespass to land or the erection of a building which would obstruct the plaintiff's lights. A mandatory injunction is an order requiring the defendant to do some positive act for the purpose of putting an end to a wrongful state of things created by him, or otherwise in fulfilment of his legal obligations: for example, an order to pull down a building which he has already erected to the obstruction of the plaintiff's lights. Prohibitory and mandatory injunctions.

2. Injunctions, whether prohibitory or mandatory, are either interlocutory or perpetual. An interlocutory injunction is one issued provisionally before the hearing of the action, in order to prevent the commission or continuance of an alleged injury in the meantime, pending an inquiry into the case and a final determination of the right of the plaintiff to a perpetual injunction. Such an interim injunction is granted summarily on affidavit, usually with an undertaking by the plaintiff to pay damages to the defendant for any loss suffered by him in consequence, if it subsequently appears that the plaintiff is not entitled to an injunction on the merits. A perpetual injunction, on the other hand, is one issued after the hearing and determination of the question at issue between the parties. Interlocutory and perpetual injunctions.

3. Injunctions are either (1) against the *continuance* of an injury, (2) against the *repetition* of one, or (3) against the *commission* of one. The commonest and most important case is the first of these; an injunction is the ordinary and *Quia timet* actions.

²⁹ *Prosser v. Lancashire & Yorkshire Accident Insurance Co.* (1890) 6 T.L.R. 285; *Ellen v. Gt. N. Rly. Co.* (1901) 49 W.R. 395. Cf. *Rideal v. Gt. W. Rly. Co.* (1859) 1 F. & F. 706.

most effective remedy in all cases of continuing wrongs; for example, a nuisance or the infringement of a right of light. Even when the injury is not continuing, however, an injunction may be granted if there is any sufficient reason to believe that it will be repeated: for example, a trespass under a claim to a right of way. In the third place, even if no complete injury or cause of action for damages yet exists, an injunction may be obtained in a *quia timet* action to prevent the commission of an injury in the future: as when the defendant threatens or intends to erect a building which will obstruct the plaintiff's lights, or to establish a fever hospital which will be a dangerous nuisance to the plaintiff's premises.

In all cases, however, it seems necessary that there shall be a sufficient degree of probability that the injury will in fact be continued, repeated, or committed. If there is no sufficient reason to suppose that it will be, the plaintiff will be left to bring his action for damages, when, if ever, the mischief so apprehended has become an established fact. "Where there is no ground for apprehending the repetition of a wrongful act, there is no ground for an injunction."¹ "The principle," says Chitty, J.,² "which I think may be properly and safely extracted from the *quia timet* authorities is that the plaintiff must show a strong case of probability that the apprehended mischief will in fact arise."

No injunction if obedience impracticable.

4. No injunction will be granted in a case where obedience to such an order is impracticable. "The Court will never enjoin a defendant, unless it is satisfied that the party enjoined can obey the order."³ For there are cases in which a defendant is liable in law for the continuance of a wrongful state of things, and yet has no power to put an end to it; and in such cases the plaintiff's only remedy is damages.

Jurisdiction to issue injunctions.

5. Originally injunctions were issued only by the Court of Chancery. Now, however, by the Judicature Act, 1873, sec. 25, sub-sec. 8, all divisions of the High Court have

¹ *Proctor v. Bayley* (1890) 42 Ch.D. p. 401.

² *Att.-Gen. v. Corporation of Manchester* (1893) 2 Ch. p. 92. See also *Att.-Gen. v. Corporation of Nottingham* (1904) 1 Ch. 673.

³ *Harrington (Earl) v. Derby Corporation* (1905) 1 Ch. p. 220.

power in respect of all kinds of injuries⁴ to issue injunctions, whether prohibitory or mandatory, interlocutory or perpetual, whenever "it shall appear to the Court to be just or convenient that such order should be made." Moreover by Lord Cairns' Act⁵ the court has jurisdiction, in all cases in which it might grant an injunction, to award damages "either in addition to or in substitution for such injunction."

6. The jurisdiction thus conferred upon the High Court to issue injunctions is discretionary. A claim for damages is a claim of right, but a claim for an injunction may be granted or refused by the Court in the exercise of its judicial discretion. The general principle, however, in accordance with which this judicial discretion must be exercised is that an injunction should be granted in all cases of continuing or threatened injury, unless in the particular instance there is some special reason why it should be refused. In other words, an injunction, though not a matter of right, is a matter of course, unless the Court in the exercise of its judicial discretion and on special grounds considers that this remedy would not be just or convenient. "The rule," says Lord Kingsdown,⁶ "I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common law right, . . . unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

Jurisdiction discretionary, but injunction granted as of course, save in exceptional cases.

7. It is only in very exceptional circumstances that the Court will depart from this general rule of restraining an injury by injunction, and compel a plaintiff to accept pecuniary satisfaction for his wrongs, instead of securing for him the specific fulfilment of his rights. "Ever since Lord Cairns' Act," says Lindley, L.J., in the leading case of *Shelfer v. City of London Electric Lighting Co.*,⁷ "the Court of Chancery has repudiated the notion that the legislature intended to turn that Court into a tribunal for legalising wrongful acts,

⁴ Including even libel. But as to interlocutory injunctions in cases of libel, see *Bonnard v. Perryman* (1891) 2 Ch. 209.

⁵ 21 & 22 Vict. c. 27, § 2. See *supra*, p. 118.

⁶ *Imperial Gas Light Co. v. Broadbent* (1859) 7 H.L.C. p. 612. See *Shelfer v. City of London Electric Lighting Co.* (1895) 1 Ch. p. 310 per Lord Halsbury.

⁷ (1895) 1 Ch. pp. 315, 316.

or, in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. . . . Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised except under very exceptional circumstances. I will not attempt to specify them, or to lay down rules for the exercise of judicial discretion. It is sufficient to refer by way of example to trivial and occasional nuisances; cases in which the plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief."

8. The necessity of this power of refusing an injunction in special cases in the exercise of a judicial discretion is due to the fact that the remedy of injunction, if granted in all cases as a matter of right, could be used by plaintiffs as an instrument of unjust oppression, with the most mischievous results both to individual litigants and to the public. It is notorious, for example, that the facility with which injunctions have in the past been granted to prevent the obstruction of ancient lights has led to the rise of a class of plaintiffs whose sole object is extortion, and who by a threat of preventing building operations by injunction exact sums of money immensely in excess of any loss which they sustain. A recognition of this and similar evils has resulted at the present day in greater willingness on the part of the courts to award damages instead of granting injunctions.⁸

When an injunction will be refused.

9. Since the refusal of an injunction is a matter of judicial discretion, no hard and fast rules can be laid down on the point; but we may say that there are at least two matters which will be taken into consideration by the Court, namely, (1) the magnitude of the injury complained of, and (2) the conduct of the parties.

⁸ See the observations of Lord Macnaghten and Lord Lindley in *Colls v. Home & Colonial Stores* (1904) A.C. pp. 193, 212. Cf. *Kine v. Jolly* (1905) 1 Ch. p. 504 *per* Cozens-Hardy, L.J.; *Jordeson v. Sutton etc. Gas Co.* (1899) 2 Ch. p. 259 *per* V. Williams, L.J.

The fact that the damage done or apprehended is so small that pecuniary compensation will be a just and adequate remedy, and an injunction will be needlessly oppressive, may be deemed in the discretion of the Court a sufficient reason for refusing this latter remedy. Thus in *Colls v. Home and Colonial Stores*⁹ (a case of ancient lights) Lord Lindley says : " I am convinced that even if the plaintiffs have a cause of action, the damages which could properly be awarded them would be very small, and to grant a mandatory injunction in such a case as this would be oppressive and not in accordance with the principles on which equitable relief has been usually granted." So in *Shelfer's Case*¹⁰ it is said by Smith, L.J. : " It may be stated as a good working rule that (1) if the injury to the plaintiff's legal rights is small, (2) and is one which is capable of being estimated in money, (3) and is one which can be adequately compensated by a small money payment, (4) and the case is one in which it would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction may be given."

On this principle in *Kine v. Jolly*¹¹ the Court of Appeal refused a mandatory injunction to pull down a dwelling-house obstructing the light of the adjoining dwelling-house, although the damage was estimated at £300. On the same principle injunctions have been refused in the case of merely temporary or intermittent nuisances,¹² and in the case of repeated trespasses committed under a claim of right but causing no damage,¹³ and in cases where the interest of the plaintiff in the property affected was about to determine.¹⁴

How small the injury must be in order to exclude the remedy of injunction as unduly oppressive, in accordance with this rule, is a question to which no definite reply can be given. The present tendency, however, of judicial opinion and practice is to use more freely than formerly this power of preventing an oppressive use of this remedy. In the absence of any wilful or insolent disregard of the plaintiff's

⁹ (1904) A.C. p. 212.

¹⁰ (1895) 1 Ch. p. 322.

¹¹ (1905) 1 Ch. 480.

¹² *Swaine v. Gl. N. Rly. Co.* (1864) 4 De G. J. & S. 211.

¹³ *Behrens v. Richards* (1905) 2 Ch. 614 ; *Llandudno Urban Council v. Woods* (1899) 2 Ch. 705.

¹⁴ *Jacomb v. Knight* (1863) 3 De G. J. & S. 533.

rights, the courts tend to show themselves more inclined than formerly to hold an injury to be too trivial to justify the use of the formidable weapon of injunction.¹⁵

Conduct of
the parties.

10. A second matter to be taken into account in the exercise of the Court's discretion to refuse an injunction is the conduct of the parties. If the plaintiff has acted in such a way as to render it unjust that he should obtain the benefit of this discretionary remedy, he will be left to his bare legal right of damages. "An injunction should only be awarded to those whose conduct entitles them to the interference of a court of equity."¹⁶ Thus if a plaintiff has knowingly stood by and made no objection, while the defendant has in ignorance invaded his rights (as by erecting a building which obstructs an easement of light or a right of way) no injunction will be granted to him.¹⁷

Conversely, if the defendant has himself acted with wilful and high-handed disregard of the plaintiff's rights, an injunction will be granted even in cases which would otherwise have been deemed too trivial for this remedy.¹⁸

Effect of
injunction
on interests
of defendant
or of the
public.

11. When, on the other hand, the damage done or apprehended is substantial, and there is nothing in the conduct of the plaintiff sufficient to render him undeserving of this remedy, an injunction will be granted even though its effect will be to inflict upon the defendant or upon the public at large a loss that is much greater than any benefit so conferred upon the plaintiff. The Court will not sanction, in the interest of individuals or of the public, any substantial invasion of private rights, even on the terms of paying full compensation for the injury so inflicted. "Neither," says Lindley, L.J., in *Shelfer's case*,¹⁹ "has the circumstance that the wrongdoer is in some sense a public benefactor

¹⁵ *Colls v. Home & Colonial Stores* (1904) A.C. p. 193, *per* Lord Macnaghten; *Kine v. Jolly* (1905) 1 Ch. p. 504, *per* Cozens-Hardy, L.J.

¹⁶ *Jordeson v. Sutton Gas Co.* (1899) 2 Ch. p. 260.

¹⁷ *Duke of Leeds v. Earl of Amherst* (1846) 2 Ph. p. 123; *Gaskin v. Balls* (1879) 13 Ch. D. 324. Mere delay, however, is no bar to an injunction, if the defendant has not been thereby misled into altering his position. *Fullwood v. Fullwood*, 9 Ch.D. 176.

¹⁸ *Colls v. Home and Colonial Stores* (1904) A.C. p. 193, *per* Lord Macnaghten; *Kine v. Jolly* (1905) 1 Ch. p. 495, *per* V. Williams, L.J. See *Daniel v. Ferguson* (1891) 2 Ch. 27. ¹⁹ (1895) 1 Ch. p. 316.

(e.g., a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable when Parliament has sanctioned it."

Thus injunctions have been granted prohibiting the use of electric lighting machinery which was causing structural injury and discomfort in a public house ;²⁰ prohibiting the making of coal gas to the injury of the plaintiff's vegetable garden ;²¹ prohibiting the discharge of the sewage of a town into a river to the injury of the plaintiff's fishing rights therein ;²² ordering a building to be pulled down which obstructed the windows of an adjoining building ;²³ ordering the removal of great quantities of stones and ballast that had been wrongfully deposited upon the plaintiff's oyster beds.²⁴ In this last case it is said by Holmes, L.J. :²⁵ "The defendants urge that the injunction will be of little advantage to the plaintiffs, and that the cost and trouble which it will impose on the defendants will be out of all proportion to any benefit that will follow from it. In this I am disposed to agree, but it is no legal ground for refusing the relief asked. If it were, persons in the position of the defendants would be able to acquire rights of property by wrongdoing, and to carry out a compulsory purchase not only without but in opposition to statutory authority."

12. When damages are awarded in substitution for an injunction in pursuance of the discretionary jurisdiction conferred by Lord Cairns' Act, such damages are given in respect of the future, and not merely, as at common law, in respect of damage already done in the past. Such an award of damages amounts, therefore, to a legalisation of the apprehended mischief ; the defendant has thereby purchased a right to do the act in respect of which an injunction was asked, and in respect of which damages have been given instead.

Damages in lieu of injunction.
Lord Cairns' Act.

²⁰ *Shelfer v. City of London Electric Lighting Co.* (1895) 1 Ch. 287.

²¹ *Imperial Gas Light Co. v. Broadbent* (1859) 7 H.L.C. 601.

²² *Att.-Gen. v. Borough of Birmingham* (1858) 4 K. & J. 528.

²³ *Jackson v. Normanby Brick Co.* (1898) 1 Ch. 438 ; *Daniel v. Ferguson* (1891) 2 Ch. 27.

²⁵ At p. 174.

²⁴ *Woodhouse v. Newry Navigation Co.* (1898) 1 Ir. R. 161.

There are, therefore, three alternative courses open to the Court in such cases :

- (a) To give damages for the past and an injunction for the future ;
- (b) To give damages for the past and refuse any relief as to the future, thus leaving the plaintiff free to bring a second action for further damage when it accrues ;
- (c) To give damages for the past and also damages in respect of the future in lieu of an injunction, thus finally disposing of the matter, and legalising the continuance of the injurious state of things.²⁶

§ 40.—The Limitation of Actions.

Six years' limitation in actions of tort.

1. Subject to certain exceptions which will be considered later, every action to recover damages for a tort may and must be commenced within six years after the cause of action has arisen. This is the general rule established by 21 James I. c. 16, sec. 3.

When the time begins to run.

2. The period of limitation begins to run at the time when a complete and available cause of action first comes into existence. Therefore when a wrongful act is actionable *per se* without proof of actual damage, the statute runs from the time at which the act was committed : for example, libel, assault, or trespass to land or goods. This is so even though the resulting damage does not happen or is not discovered until a later date ; for such damage is not a new cause of action, but merely an incident of the old one.¹ When, on the other hand, the wrong is not actionable without actual damage, the period of limitation does not begin to run

²⁶ *Fritz v. Hobson* (1880) 14 C.D. p. 548 and the other cases cited *supra*, p. 118, n. 27. It is unsettled whether there is any power under Lord Cairns' Act to award damages in lieu of an injunction in a *quia timet* action, where no actual harm or complete cause of action for damages yet exists. *Dreyfus v. Peruvian Guano Co.* (1889) 43 Ch. D. p. 333 ; *Martin v. Price* (1894) 1 Ch. 276. It is possible, therefore, that in such a case the Court has only two alternatives, namely either to grant an injunction or dismiss the action.

¹ *Battley v. Faulkner* (1820) 3 B. & Ald. 288, 22 R.R. 390 ; *Roberts v. Read* (1812) 16 East 215, 14 R.R. 335 ; *Howell v. Young* (1826) 5 B. & C. 259, 29 R.R. 237 ; *Hughes v. Twisden* (1886) 55 L.J. Ch. 481 ; *Short v. McCarthy* (1820) 3 B. & Ald. 626, 22 R.R. 503.

until that damage happens : as in the case of negligence, fraud, or wrongful interference with an easement of support. Except, however, in the case of continuing injuries, additional damage accruing at a later date is not a new cause of action, but is subject to the same period of limitation as that which first accrued.²

3. When the injury is a continuing one, for example *Continuing injuries.* a nuisance, a new cause of action arises *de die in diem* or as often as fresh damage accrues ; and therefore an action will always lie in respect of any continuance of the wrong, or any accrual of fresh damage, which is not more than six years old. Thus when a continuing nuisance has lasted for ten years, an action will lie for damages for its continuance during the last six years, although any claim for damages for the first four years is barred by the statute. So in the case of withdrawal of support from land an action will lie for any subsidence not more than six years old.³

4. Even when a cause of action is otherwise complete, it may be that there is not yet in existence any person who is capable of instituting the action, or any defendant capable of being sued ; and in such case the statute does not begin to run until this bar to the institution of an action has disappeared. Thus if a tort is committed against the estate of an intestate in the interval between his death and the grant of letters of administration, the statute does not begin to run until an administrator is appointed.⁴ Similarly the statute does not begin to run in favour of a foreign ambassador until the termination of his period of office ; for until then no action will lie against him.⁵ If, however, a complete and available cause of action has once come into existence, no subsequent and temporary bar to the institution of an

² *Roberts v. Read* (1812) 16 East 215, 14 R.R. 335 ; *Thomas v. Lord Clanmorris* (1900) 1 Ch. 718 ; *Backhouse v. Bonomi* (1861) 9 H.L.C. 503.

³ *Whitehouse v. Fellowes* (1861) 10 C.B. (N.S.) 765 ; *Backhouse v. Bonomi* (1861) 9 H.L.C. 503 ; *Darley Main Colliery Co. v. Mitchell* (1886) 11 A.C. 127 ; *Crumbie v. Wallsend Local Board* (1891) 1 Q.B. 503.

⁴ *Murray v. East India Co.* (1821) 5 B. & Ald. 204, 24 R.R. 325.

⁵ *Musurus Bey v. Gadban* (1894) 2 Q.B. 352.

action, for example the death of either party intestate, has any effect in suspending the running of the statute.⁶

Disability of
plaintiff.
Absence of
defendant.

5. If, when the cause of action first arises, the plaintiff is a minor or a lunatic, or the defendant is absent from the United Kingdom, the period of limitation does not begin to run until the plaintiff becomes of age or of sound mind or the defendant comes into the Kingdom.⁷ These disabilities must exist at the time when the cause of action first arises. If the statute has once commenced to run, no subsequent insanity of the plaintiff or absence of the defendant beyond the seas will have any effect.⁸

Rule of con-
cealed fraud.

6. When the defendant has been guilty of fraud or other wilful wrongdoing, the period of limitation does not begin to run until the existence of a cause of action has become known to the plaintiff. This is commonly spoken of as the rule of concealed fraud, but the term *fraud* is here used in its widest sense as meaning any act of wilful and conscious wrongdoing: for example, a wilful underground trespass and abstraction of minerals. The term *concealed*, moreover, does not imply any active suppression of the facts by the defendant, but means merely that the wrong is unknown to the person injured at the time of its commission.⁹

In all other cases save that of concealed fraud as thus defined, the statute runs from the time when the cause of action first arises, and it makes no difference whether the cause of action was or was not known to the plaintiff, or whether it was or was not discoverable by him.

This exception of concealed fraud is not expressed in the

⁶ *Rhodes v. Smethurst* (1840) 6 M. & W. 351; 51 R.R. 461.

⁷ The rule as to the infancy or lunacy of the plaintiff is established by 21 Jac. I. c. 16, sec. 7, and the rule as to the absence of the defendant by 4 Anne c. 16, sec. 19, and 19 & 20 Vict. c. 97, sec. 12. By virtue of this last Act the Isle of Man and the Channel Islands are to be deemed for this purpose part of the United Kingdom. By the statute of James I. the coverture or imprisonment of the plaintiff or the absence of the plaintiff beyond the seas also prevented the statute from running, but these exceptions are no longer recognised. 45 & 46 Vict. c. 75, s. 1; 19 & 20 Vict. c. 97, s. 10. As to the effect of the temporary presence of the defendant within the realm, see *Gregory v. Hurrill* (1823) 1 Bing. 324.

⁸ *Rhodes v. Smethurst* (1840) 6 M. & W. 351; 51 R.R. 461.

⁹ *Bulli Coal Mining Co. v. Osborne* (1899) A.C. 351.

statute, but was established by the Court of Chancery as being conformable to the spirit of the statute, if not to its letter. According to certain decisions,¹⁰ which are not, however, of such authority as to determine the matter finally, no such exception was recognised by the courts of common law; but whether this was so or not, the better opinion is that since the Judicature Act the equitable rule has become applicable in all cases.^{11 12}

§ 41.—Special Periods of Limitation.

The general limitation of six years established by the Act of James I. is subject to certain exceptions, there being particular species of injuries for which a shorter period is appointed. Some of these exceptions are established by the principal Act itself and others by later enactments.

1. *Slander*. It is provided by the Act of James I. that an action for slander must be brought within two years. This provision, however, applies only to slander actionable *per se*; slander actionable only on proof of special damage is subject to the ordinary limitation of six years from the date when the damage accrued.¹ This two years' limitation is subject to the same qualifications as to disability, absence, and so forth, as the ordinary limitation of six years.

¹⁰ *Imperial Gas Light Co. v. London Gas Light Co.* (1854) 10 Ex. 39.

¹¹ *Gibbs v. Guild* (1881) 8 Q.B.D. 296; 9 Q.B.D. 59; *Armstrong v. Milburn* (1886) 54 L.T. N.S. 247, 723. It has been suggested, however, that the equitable rule does not even yet apply to causes of action which were formerly cognizable solely at common law. *Barber v. Houston* (1885) 18 L.R. Ir. 475; *Armstrong v. Milburn*, *supra*, *per* Matthew, J. at p. 249.

¹² It is commonly said that the rule of concealed fraud does not apply when the plaintiff could by the exercise of care and diligence have discovered the fraud. In other words, it is said that the statute runs not from the time when the cause of action was discovered by the plaintiff, but from any earlier time at which it ought to have been discovered. But there seems to be no decision to this effect, and it is difficult to see what duty of care or diligence a person defrauded owes to him who defrauded him. See *Bulli Coal Mining Co. v. Osborne* (1899) A.C. at p. 363; *Beljemann v. Beljemann* (1895) 2 Ch. p. 482.

¹ *Saunders v. Edwards* (1662) Sid. 95. The reason is that the statute says "two years next after the words spoken," implying that the cause of action is then complete.

2. *Injuries to the person.* By the Act of James I. actions for assault, false imprisonment, trespass to the person, and possibly other forms of personal injury, must be brought within four years, subject, however, to the same qualifications as in the six years' period.²

Public
authorities
Protection
Act.

3. *Actions against public authorities.* By the Public Authorities Protection Act, 1893,³ it is provided that where "any action . . . is commenced . . . against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, . . . the action shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in the case of a continuance of injury or damage, within six months next after the ceasing thereof."

This Act, notwithstanding the generality of its language, probably extends only to the protection of public authorities, and not to the protection of private persons or bodies corporate, even though they have statutory duties or powers imposed on or vested in them for the benefit of the public: for example a railway company or a harbour company.⁴ On the other hand the Act protects public authorities not merely in the exercise of their strictly public functions, but also in the exercise of functions of the same nature as those exercised by private persons—provided, at least, that these functions are not optional merely, but are performed as a matter of statutory obligation. Thus a municipal corporation which lies under a statutory duty to carry passengers on its tramways has the protection of the Act in respect of the negligence of its servants, whereby personal injuries are inflicted on a passenger.^{5 6}

² The words of the statute are "actions of trespass of assault, battery, wounding, imprisonment." *Quære* whether this includes personal injuries for which the action under the old practice was not trespass but case. ³ 56 & 57 Vict. c. 61. s. 1.

⁴ *Lyles v. Southend-on-Sea Corporation* (1905) 2 K.B. at p. 13.

⁵ *The Ydun* (1899) P. 236; *Parker v. L.C.C.* (1904) 2 K.B. 501; *Lyles v. Southend-on-Sea Corporation* (1905) 2 K.B. 1.

⁶ In *The Earl of Harrington v. The Corporation of Derby* (1905) 1 Ch. 205, it was decided by Buckley, J., that in the case of a con-

4. A fourth exception comprises all those miscellaneous cases in which a right of action in tort is conferred by a statute which also establishes for it a special period of limitation. Examples are the Employers' Liability Act, 1880, the Fatal Accidents Act, 1846, and the Civil Procedure Act, 1833, conferring rights of action against executors. When a statute creates a new tort and imposes no period of limitation, the case falls within the general provisions of the Act of James I.⁷ ⁸

§ 42.—Felonious Torts.

1. When a tort is also a felony, it seems that no action can be brought in respect of the tort, until the defendant has been prosecuted for the felony. "It has been long established as the law of England," says Cockburn, C.J., in *Wells v. Abrahams*,¹ "that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted." The rule is designed in the interests of public justice, for it compels persons

No action for felonious tort until felon prosecuted.

continuing injury, such as a nuisance, the plaintiff, although he must sue within six months after the ceasing of the injury, may in such an action recover compensation for all damage which has accrued within the ordinary period of *six years* before action brought. In *Williams v. Mersey Docks and Harbour Board* (1905) 1 K.B. 804, it was decided by the Court of Appeal that an action against a public authority under the Fatal Accidents Act, 1846, must be brought within six months from the date of the injury to the deceased, and therefore that if his death does not ensue until after six months from the injury, no action will lie at all. For other decisions on the meaning of the Public Authorities Protection Act, see *Greenwell v. Howell* (1900) 1 Q.B. 535, and *Tilling v. Dick, Kerr & Co.* (1905) 1 K.B. 562.

¹ *Thomson v. Lord Clanmorris* (1900) 1 Ch. 718. This case decides that the two years' period of limitation provided by the Civil Procedure Act, 1833, for "actions for penalties damages or sums of money given by any statute" applies only to penal actions, and not to statutory torts for which the remedy is an action for damages.

⁸ As to the effect of the statutes of limitation upon the title to chattels, see the Chapter on Conversion. As to the law of prescription as a defence to an action for nuisance, see the Chapter on Nuisance. The operation of the statutes of limitation upon the title to land belongs to the law of property, and not to that of torts.

¹ (1872) L.R. 7 Q.B. p. 557.

injured by criminal offences to fulfil their duty of prosecuting the offender, instead of contenting themselves with the enforcement of their private rights. This seems, however, to be no sufficient justification for such an interference with the ordinary course of civil justice. Moreover the authority for the rule is scanty and unsatisfactory. It has been often laid down in judicial dicta, but has been seldom applied; doubt has been cast upon it; and it seems not impossible that it may be declared in future to be no part of the law of England.²

2. If the defendant in an action of tort wishes to raise the objection that the wrong complained of amounts to a felony, it seems that the proper procedure is not to raise this as a defence in the pleadings, but to make an application to the court to stay the action.³

Exceptions
to general
rule.

3. The rule has no application unless the person sued for the tort is the felon himself. If he is a third person innocent of any felony, although civilly responsible for the tort, an action will lie against him, whether the felon has been prosecuted or not. Thus an action will lie against a master in respect of a felonious tort committed by his servant in the course of his employment.⁴ So the innocent receiver of stolen goods may be sued in trover, although the thief has not been prosecuted.⁵

² See *Welloch v. Constantine* (1863) 2 H. & C. 146; *Cox v. Paxton* (1810) 17 Ves. 329, 11 R.R. 95; *Marsh v. Keating* (1834) 2 Cl. & F. p. 288, 37 R.R. p. 103; *Wells v. Abrahams* (1872) L.R. 7 Q.B. 554; *White v. Spettigue* (1845) 13 M. & W. 603, 67 R.R. 753; *ex pte Ball* (1879) 10 Ch. D. 667; *Appleby v. Franklin* (1886) 17 Q.B.D. 93; *Rooke v. d'Avigdor* (1883) 10 Q.B.D. 412; *Midland Insurance Co. v. Smith* (1881) 6 Q.B.D. 561.

³ *Wells v. Abrahams* (1872) L.R. 7 Q.B. 554; *Rooke v. d'Avigdor* (1883) 10 Q.B.D. 412; *ex pte Ball* (1879) 10 Ch. D. 667; *Appleby v. Franklin* (1886) 17 Q.B.D. 93. In *Welloch v. Constantine* (1863) 2 H. & C. 146, indeed, a plaintiff suing for damages for a rape was nonsuited because of the felony, and the nonsuit was upheld by a majority of the Court of Exchequer, but this case has been disapproved (*Wells v. Abrahams*, *ex pte Ball*, *supra*) and may be regarded as not law.

⁴ *Osborn v. Gillett* (1873) L.R. 8 Ex. 88.

⁵ *White v. Spettigue* (1845) 13 M. & W. 603; *Marsh v. Keating*, (1833) 2 Cl. & F. 250, 37 R.R. 75.

4. The rule has no application unless the plaintiff in the action of tort is the person who was injured by the felony, and whose duty it therefore is to institute a prosecution. Thus if the person injured becomes bankrupt, his right of action may pass to his trustee, but it is not accompanied by the duty of prosecuting, and therefore the trustee's right of action is not suspended.⁶

5. The rule applies only to felonies, not to mere misdemeanours, or criminal offences punishable only on summary conviction.

6. The rule does not apply to actions brought under the Fatal Accidents Act, even though the killing of the deceased amounted to murder or manslaughter. This Act expressly provides that the action will lie "although the death shall have been caused under such circumstances as amount in law to felony."

7. The rule does not apply if the prosecution of the offender has become impossible notwithstanding due diligence on the part of the person whose duty it was to prosecute: as, for example, when the offender has died or escaped from the jurisdiction, before there has been any undue delay in commencing a prosecution.⁷

§ 43.—Assignment of Rights of Action for Torts.

1. The assignment of a right of action for damages for a tort is in general illegal and void. There is, indeed, no decided case which definitely establishes this rule or determines the precise limits of it. Nevertheless it has been so often said or assumed to be the law, that there is no serious doubt as to the general principle, though its exceptions and qualifications must remain in the meantime a matter of some uncertainty.¹ The rule is based on considerations of public policy and is designed to prevent the oppressive litigation

Right of action for tort not assignable.

⁶ *Ex parte Ball* (1879) 10 Ch. D. 667.

⁷ *Marsh v. Keating* (1833) 2 Cl. & F. 250, 37 R.R. 75; *ex parte Ball* (1879) 10 Ch. D. 667.

¹ *May v. Lane* (1894) 64 L.J. Q.B. 236; *Dawson v. Gt. N. Rly. Co.* (1905) 1 K. B. 260; *Prosser v. Edmonds* (1835) 1 Y. & C. 481, 41 R.R. 322.

that would result if a right of action for damages were recognised as a marketable commodity capable of purchase by way of a commercial speculation. The purchase of a right of action for a tort is, indeed, merely a particular form of the offence of maintenance—the act of assisting and promoting without lawful justification the litigation of others.

2. The rule applies to torts of all kinds, whether they are injuries to property or to the person or otherwise, and the suggestion which has sometimes been made that injuries to property are an exception seems not maintainable.²

3. The rule is not limited to rights of action for a tort, but applies equally to rights of action for damages for a breach of contract. The general principle is that no right to recover damages for an unlawful act, whether it is a tort or a breach of contract, is legally recognised as a form of assignable property.³

Qualifications of
general rule.

4. But the rule is not applicable where the right assigned has some other source than an illegal act. It is on this principle that rights arising under a contract are assignable, as opposed to rights arising from the breach of a contract. So also with rights arising *quasi ex contractu*, as in the case of money paid by mistake. On the same principle there should be no objection to the assignment of a judgment debt even in an action of tort, or to the assignment of money agreed to be paid by way of settlement of a claim in tort. So also a claim for compensation under the Lands Clauses Consolidation Act 1845, sect. 68, in respect of lands injuriously affected by an exercise of statutory power is legally assignable.⁴

5. The rule does not prevent the assignment of property merely because it is the subject of litigation and cannot be recovered without an action. Thus a sale of chattels by A to B, while they are wrongfully detained by C, is valid and confers upon B a right of action against C.⁵

6. The rule does not prevent the assignment by a trustee in bankruptcy of the bankrupt's choses in action, even though

² See *Dawson v. Gl. N. Rly. Co.* (1905) 1 K.B. 260.

³ *May v. Lane* (1894) 64 L.J. Q.B. 236 *per* Esher, M.R., and Rigby, L.J.

⁴ *Dawson v. Gl. N. Rly. Co.* (1905) 1 K.B. 260.

Dawson v. Gl. N. Rly. Co. (1905) 1 K.B. p. 271.

they arise *ex delicto*. For the trustee has a statutory power and duty of realising the assets, and therefore of selling them if he pleases.⁶

7. The rule does not prevent the subrogation of an insurer to the right of the insured, even though these rights are rights of action for damages for a tort.⁷

8. Presumably the rule does not apply to any other case in which the assignee has any lawful interest in the subject-matter sufficient to exclude the doctrine of maintenance: for example, an assignment by a trustee to his beneficiaries of a right of action for an injury to the trust estate.⁸

9. Possibly a right of action for an injury to property is assignable along with the property itself.⁹ Indeed it would seem that in the case of injuries to property the right of action runs with the property without any express assignment, so that a new owner may sue although the wrong was committed before he became the owner. Thus in *Bristol and West of England Bank v. Midland Railway Co.*¹⁰ the Court of Appeal, following the judgment of Wightman, J., in *Goodman v. Boycott*,¹¹ held that a purchaser of goods could sue for a conversion of them committed before the date of the purchase. On the same principle the purchaser of land from which minerals have already been wrongfully extracted by a trespasser should have a good cause of action for that trespass. The law on all this matter, however, is difficult and uncertain.

10. When a right of action for a tort is assignable at all, it is a legal chose in action within the meaning of the Judicature Act 1873, sect. 25, so that the assignee may sue in his own name.¹²

⁶ *Seear v. Lawson* (1880) 15 Ch. D. 426; *Guy v. Churchill* (1888) 40 Ch. D. 481.

⁷ *King v. Victoria Insurance Co.* (1896) A.C. 250.

⁸ *Guy v. Churchill* (1888) 40 Ch. D. 481.

⁹ *Dawson v. Gt. N. Rly. Co.* (1905) 1 K.B. at p. 271; *Williams v. Protheroe* (1829) 5 Bing. 309, 30 R.R. 608.

¹⁰ (1891) 2 Q.B. 653.

¹¹ (1862) 2 B. & S. 1.

¹² *King v. Victoria Insurance Co.* (1896) A.C. 250.

Effect of
illegal assign-
ment.

11. When, in accordance with the general principle, a right of action for a tort is not assignable, an attempted assignment of it has presumably the following effects:

- (a) The assignment is void as between the parties, and the right of action remains vested in the assignor and, enforceable by him.
- (b) An action by the assignee in his own name will fail.
- (c) An action by the assignee in the name and by the authority of the assignor will amount to the wrong of maintenance.

§ 44.—The Waiver of Torts.

Election
between
action on
tort and
action on
fictitious
contract.

1. There are certain cases in which a person injured by a tort is entitled, if he pleases, to waive the tort, as it is termed, and to sue instead for the breach of a quasi-contract—a contract fictitiously implied by law. In the days when forms of action still existed he had his election either to sue in *trespass*, *trover*, *case*, or some other delictual action, or to use instead the remedy appropriate to the breach of a simple contract, namely *assumpsit*; and although forms of action are now happily abolished, the process of waiving a tort has not yet ceased to be of practical importance.

In what
cases waiver
allowed.

2. The waiver of a tort is not allowed in all cases; it is a special device for special occasions. There is no general rule that he who is injured by a tort can sue on an implied contract to pay compensation for the harm so done. In what cases, then, is a waiver permitted? As the authorities stand this question is not one which it is possible to answer completely. There is, however, one rule which may be laid down with confidence: when the defendant has by means of a tort become possessed of a sum of money at the expense of the plaintiff, the plaintiff may at his election sue either for damages for the tort, or for the recovery of the money thus wrongfully obtained by the defendant; and this latter action (an action for money had and received by the defendant to the use of the plaintiff) is based on an implied contract of agency, the defendant being fictitiously assumed to have rightfully received the money as the plaintiff's agent, and to have failed to pay it over to his principal.

This is so, for example, if the defendant wrongfully takes by trespass or obtains by fraud the money of the plaintiff.¹ So also if the plaintiff's goods are wrongfully converted and sold by the defendant, the plaintiff may choose between an action of trover for the value of the goods and an action of quasi-contract for the price so received by the defendant. "If a man's goods are taken by an act of trespass and are subsequently sold by the trespasser and turned into money, he may maintain trespass for the forcible injury, or waiving the force he may maintain trover for the wrong, or waiving the tort altogether he may sue for money had and received."² So if the defendant has usurped the plaintiff's office and received the fees belonging to it, the plaintiff may either sue him in *case* for this disturbance of his office, or in *assumpsit* for the money so received.³

3. It is far from clear, however, how much further this doctrine of the waiver of torts extends. There are authorities which, if they could be relied on, would justify us in laying down a general rule to the effect that whenever the defendant has by his tort acquired a profit of any sort (whether it is the receipt of money or not) the tort may be waived, and an action of contract brought to compel payment of a pecuniary equivalent for that profit. Thus in *Lightly v. Clouston*⁴ the defendant had wrongfully taken the plaintiff's apprentice into his employment, and the plaintiff, instead of suing in tort for damages for this invasion of his right to the services of his apprentice, successfully sued in *assumpsit* to recover a reasonable remuneration for these services as on a contract of hiring. It is doubtful, however, whether any such general extension of the doctrine of waiver is justifiable.⁵

4. In those cases in which the waiver of a tort is permitted the two causes of action—delictal and quasi-contractual—
Destruction of one cause of action by election of the other.

¹ *Neale v. Harding* (1851) 6 Ex. 349.

² *Rodgers v. Maw* (1846) 15 M. & W. p. 448.

³ *Arris v. Stukeley* 2 Mod. p. 262.

⁴ (1808) 1 Taunt. 112; 9 R.R. 713.

⁵ See also *Foster v. Stewart* (1814) 3 M. & S. 191, 15 R.R. 459; *Hambly v. Trott*, Cowp. 375; *Russell v. Bell* (1842) 10 M. & W. 340, 462 R.R. 639; *Rumsey v. N.E. Rly. Co.* (1863) 32 L.J. C.P. 244; *Phillips v. Homfray* (1883) 24 Ch. D. 439.

are not cumulative but alternative. The plaintiff must make his election between them and cannot pursue both. Anything, therefore, which exhausts or extinguishes one of the causes of action destroys the other also. Thus judgment recovered, even without satisfaction, in an action of tort merges and destroys not merely the cause of action in tort, but also the cause of action in contract; and conversely a judgment in contract is a bar to any subsequent action based on the tort. Accordingly when the plaintiff's goods have been converted and sold, and he obtains judgment in an action for money had and received, he cannot thereafter resort to an action of trover; and this is so even though the damages recoverable in trover would far exceed the price for which the defendant sold the goods, and for which judgment has been obtained against him.⁶

5. The same result follows if one of the causes of action is destroyed not by a merger in a judgment, but by accord and satisfaction or any other form of release. The settlement of a claim or action for money had and received will effectively destroy any right to proceed subsequently for damages in tort; and this is so regardless of the relative values of the two claims. In all such cases, however, it is a question of fact depending upon the intention of the parties, whether the payment made by the defendant to the plaintiff was in truth an accord and satisfaction extinguishing the cause of action, rather than a mere payment on account in reduction of damages.⁷

6. For the same reason, when there are joint wrongdoers, a judgment obtained against one of them in tort, or an accord and satisfaction made with him in respect of a claim in tort, will be a bar to any claim for money had and received against the other, and *vice versa*.⁸

⁶ *Rice v. Reed* (1900) 1 Q.B. 54; *Buckland v. Johnson* (1854) 15 C.B. 145; *Smith v. Baker* (1873) L.R. 8 C.P. 350.

⁷ Compare *Rice v. Reed* (1900) 1 Q.B. 54, and *Burn v. Morris* (1836) 4 Tyrwhitt 485, 44 R.R. 891, with *Brewer v. Sparrow* (1827) 7 B. & C 310, and *Lythgoe v. Vernon* (1860) 5 H. & N. 180.

⁸ *Buckland v. Johnson* (1854) 15 C.B. 145. Cf. *Rice v. Reed* (1900) 1 Q.B. 54.

7. On the other hand a mere demand for money had and received, not followed by an actual settlement, is not such an election to waive the tort as will preclude an action for it.⁹ It has been said, however, that the commencement of an action amounts to a conclusive election, even though it is not followed by any judgment or settlement. "If an action for money had and received is brought, that is in point of law a conclusive election to waive the tort; and so the commencement of an action of trespass is a conclusive election the other way."¹⁰ This doctrine, however, seems to be unsupported by any decision, and is contrary to other authorities.¹¹

§ 45.—Foreign Torts.

1. No action will lie in England for any trespass or other tort committed in respect of land situated out of England.¹ This is so even if no question as to the title to the land is in issue between the parties, and even though the property is situated in uncivilised regions out of the territory and jurisdiction of any civilised state. In the case of contracts and trusts, on the other hand, the jurisdiction of English courts is not excluded by the fact that the land to which the contract or trust relates is out of England.²

No action for tort in respect of foreign land.

2. Except in the case of injuries to land, an action of tort will lie in England although the cause of action has arisen abroad. Provided that the person of the defendant is within the jurisdiction of the English courts, he can be sued in England for a libel published in New York or for an assault committed in Turkey. In order, however, that an action should thus lie for a tort committed out of England, two conditions must be fulfilled:

Action lies for other foreign torts on two conditions.

(a) The act must have been unlawful in the place where it was done.

⁹ *Valpy v. Sanders* (1848) 5 C.B. 886; *Morris v. Robinson* (1824) 3 B. & C. 196, 27 R.R. 322; *Rice v. Reed* (1900) 1 Q.B. 54.

¹⁰ *Smith v. Baker* (1873) L.R. 8 C.P. 350 *per* Bovill, C.J.

¹¹ See *Hitchin v. Campbell* (1771) 2 W. Bl. 827; *Morris v. Robinson* (1824) 3 B. & C. 196, 27 R.R. 322; *Rice v. Reed* (1900) 1 Q.B. 54.

¹ *British South Africa Company v. Companhia de Mocambique* (1893) A.C. 602.

² See *Ewing v. Orr Ewing* (1883) 9 A.C. p. 40, *per* Lord Selborne.

(b) It must be of a kind which would have been actionable as a tort, had it been done in England.

Act must be unlawful where done.

3. In the first place, the act must have been unlawful in the place where it was done. "It appears to us clear," says Cockburn, C.J., in *Phillips v. Eyre*,³ "that where by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law if committed here, cannot be made the ground of an action in an English court."

4. It seems, however, that the act need not be *actionable* in the place where it is done, in order to be actionable in England. It is sufficient if it is *illegal* and the subject of criminal proceedings. This was decided by the Court of Appeal in *Machado v. Fontes*,⁴ in which a plaintiff recovered damages in England for a libel published in Brazil, although libel is not in Brazil a cause of action for damages, but exclusively a criminal offence. It seems curious that a man should be held liable in damages in England for doing an act abroad which exposes him to no such liability according to the *lex loci delicti*, and without any voluntary submission on his part to the English law on the matter.

Act must be of a kind actionable by English law.

5. The second condition that must be fulfilled before an action for a foreign tort will lie in England is that an act of that sort must amount to an actionable tort in accordance with the law of England. That is to say, the law which will be applied in determining the existence, measure, and nature of the defendant's liability is the law of England (the *lex fori*), and not the law of the place where the tort was committed (the *lex loci delicti*). The *lex loci delicti* may serve to justify the act, as we have seen, and to exclude any action in England, but it does not create any right of action in England; for this right must be given by English law itself.

Thus in *The Halley*⁵ an action was brought by the owner of a Norwegian barque against the owner of a British steamer for damage done by collision in Belgian waters. The steamer was at the time of the collision compulsorily in charge of

³ (1869) L.R. 4 Q.B. p. 239. See also *The Moxham* (1876) 1 P.D. 107; *Carr v. Francis Times & Co.* (1902) A.C. 176.

⁴ (1897) 2 Q.B. 231,

⁵ (1868) L.R. 2 P.C. 193.

a pilot, and compulsory pilotage is a good defence to the ship-owner by the law of England, but not by the law of Belgium. It was held that no action would lie in England, notwithstanding the fact that the act complained of was wrongful and actionable by the *lex loci delicti*. English courts, that is to say, will not enforce an *obligatio ex delicto* created by foreign law. "It is," says the Privy Council,⁶ "alike contrary to principle and to authority to hold that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which according to its own principles imposes no liability on the person from whom the damages are claimed."⁷

⁶ *Ibid.* p. 204.

⁷ See also *The Moxham* (1876) 1 P.D. 107; *Phillips v. Eyre* (1870) L.R. 6 Q.B. at p. 28.

CHAPTER IV.

EXTRAJUDICIAL REMEDIES.

Modes of permitted self help.

It is not necessary in all cases that a man should resort to judicial proceedings in order to seek protection or redress in respect of injuries threatened or committed against him. In many instances the law grants him liberty to help himself by his own act and strength without recourse to any court of justice or the sanction of any judicial declaration of his rights. Of these authorised modes of self-help or self-redress the following are the most important :—

1. Defence of the person against illegal violence.
2. Forcible prevention of trespass to land.
3. Re-entry on land.
4. Defence and recaption of chattels.
5. Abatement of nuisances.
6. Distress damage feasant.

§ 46.—Self Defence.

Use of force in self-defence.

1. It is lawful for any person to use a reasonable degree of force for the protection of himself or any other person against any unlawful use of force. Force is not reasonable if it is either (a) unnecessary, *i.e.*, greater than is requisite for the purpose, or (b) disproportionate to the evil to be prevented.

2. In the older books a distinction is drawn between the defence of oneself and of certain persons with whom one is closely connected, such as a wife, child, or master, and the defence of a mere stranger. The full right of defence is said to be limited to the first of these cases, while in the latter case the law is said to grant only a more restricted liberty of using force. Thus we are told that a servant may

lawfully make an assault in defence of his master, but not a master in defence of his servant.¹ It may be safely assumed, however, that at the present day all such distinctions are obsolete. and that every man has the right of defending any man by reasonable force against unlawful force.

3. In order that it may be deemed reasonable within the meaning of this rule, it is not enough that the force was not more than was necessary for the purpose in hand. For even though not more than necessary, it may be unreasonably disproportionate to the nature of the evil sought to be avoided. "A man cannot justify a maim for every assault; as if A strike B, B cannot justify the drawing his sword and cutting off his hand; but it must be such an assault whereby in probability the life may be in danger."² One cannot lawfully defend himself against a trivial assault by inflicting death or grievous bodily harm, even though the assault cannot be prevented in any other way.

Force must be reasonable.

4. He on whom an assault is threatened or committed is not bound to adopt an attitude of passive defence. He may lawfully take measures of aggression on his own account, so long as he does not go beyond what is reasonable as a measure of self-defence. Nor need he make any request or give any warning, but may forthwith reply to force by force.³

§ 47.—Prevention of Trespass.

1. It is lawful for any occupier of land, or for any other person with the authority of the occupier, to use a reasonable degree of force in order to prevent a trespasser from entering or to eject him after entry.

Force to prevent trespass.

2. This right of using force against trespassers is conferred only on the occupier of the land (or his agents), for it is only the occupier who is entitled to complain of a trespass and to take legal proceedings in respect thereof. The

Right confined to occupiers.

¹ *Leward v. Basely* (1695) 1 Ld. Raym. 62.

² *Cook v. Beal* (1697) 1 Ld. Raym. 176; *Cockroft v. Smith* (1705) 11 Mod. 43; *Dale v. Wood* (1822) 7 Moore 33.

³ *Green v. Goddard* (1704) 2 Salk. 641.

mere use of property, therefore, without the exclusive possession of it, will not justify the use of force to exclude others.¹

Request
necessary.

3. Except when a trespass is committed by actual force, the trespasser cannot be forcibly repelled or ejected until he has been requested to leave the premises, and a reasonable opportunity of doing so peaceably has been afforded to him. As against him who enters or seeks to enter by force, however, force may be forthwith used without any request made.²

Amount
of force per-
mitted.

4. As to the amount of force that may be used against a trespasser, the general rule is that it must not exceed that which is indicated in the old forms of pleading by the phrase *molliter manus imposuit*. That is to say, it must amount to nothing more than forcible removal, and must not include beating, wounding, or other physical injury. Thus in *Collins v. Renison*³ the plaintiff sued for the assault of throwing him off a ladder, and it was held a bad plea that the plaintiff was trespassing and refused after request to leave the premises and that the defendant thereupon "gently shook the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, thereby doing as little damage as possible to the plaintiff."

5. There are two exceptions to this rule as to *molliter manus imposuit* :—

(a) If the trespasser in the course of eviction makes or threatens to make an assault upon the person evicting him, the case becomes one of the defence of the person, and thereafter any force may be used which is reasonable within the rule as to self-defence already considered, even though it involves beating or physical harm.⁴

(b) If the trespasser enters or seeks to enter by way of a forcible felony, the case falls within the rule that

¹ *Dean v. Hogg* (1834) 10 Bing. 345, 38 R.R. 443; *Holmes v. Bagge* (1853) 1 E. & B. 782; *Roberts v. Tayler* (1845) 1 C.B. 117. As against a mere wrongdoer, however, actual possession without title is doubtless sufficient, just as in an action of trespass.

² *Polkinhorn v. Wright* (1845) 8 Q.B. 197; *Green v. Goddard* (1704) 2 Salk. 641. ³ (1754) 1 Sayer, 138. ⁴ *Supra*, § 46.

any force is justifiable which is necessary to prevent the commission of a felony by force.⁶

6. The forcible ejectment of a trespasser must be carefully distinguished from forcible re-entry upon land of which possession has been wrongfully taken or detained. This case will be considered later. When a trespasser has not merely entered, but has dispossessed the former occupier, and taken possession of the land himself, any use of force against him thereafter is not the ejectment of a trespasser, but forcible entry upon land in the possession of another, and is governed, as we shall see, by different rules.⁷

Forcible
entry dis-
tinguished.

§ 48.—Re-entry on Land.

1. He who is wrongfully dispossessed of land is not bound to proceed for its recovery by action at law, for he may re-take possession of it by his own act, if he can do so peaceably and without the use of force.¹ A forcible entry, however, even by a person lawfully entitled to the possession, is an indictable misdemeanour under the Statutes of Forcible Entry. It is provided by 5 Rich. II. st. 1, c. 8 that under pain of imprisonment no one shall "make entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand nor with multitude of people, but only in peaceable and easy manner." Entry by means of a threat to use force will be deemed forcible, even though no force is actually used.² The force need not consist in violence towards the person of the occupant or anyone else, for it is a forcible entry to break into a house even though no one is present in it.³

Forcible
entry a crim-
inal offence.

2. It is a forcible entry to enter peaceably and then eject by force the adverse occupant. Before force can be so used, real and effective possession must be obtained, and not the merely formal or nominal possession acquired by entering into premises in which a hostile possessor is still present.⁵

⁶ Stephen's Digest of Criminal Law, Art. 220, 6th ed. ⁷ *Infra*, § 48.

¹ *Taunton v. Costar* (1797) 7 T.R. 431; 4 R.R. 481.

² *Hawkins' Pleas of the Crown*, Ch. 64, sec. 27.

⁵ *Bacon's Abridg. Forcible Entry*, B.; *Edwick v. Hawkes* (1881) 18 Ch. D. at p. 211.

³ *Com. Dig. Forcible Entry*, A. 2.

But not a
civil injury if
right of
entry exists.

3. Forcible entry, however, upon a person wrongfully in possession by a person entitled to the possession is, although a criminal offence, no civil injury for which the wrongdoer so ejected has any remedy. He can neither sue in ejectment for the recovery of the land, nor in trespass for damages.⁶

4. It has nevertheless been said and sometimes decided that if in the course of a forcible entry an assault is committed upon the occupier or other person defending the possession, or damage is done to chattels upon the premises, an action for damages will lie in respect of this independent injury, although none lies for the entry and eviction itself. It was so held by a majority of the Court of Common Pleas in the case of *Newton v. Harland*,⁷ which was followed by Fry, J., in *Beddall v. Mailland*.⁸ In *Harvey v. Brydges*,⁹ on the other hand, the decision in *Newton v. Harland* was disapproved by the Court of Exchequer, Baron Parke saying: "If it were necessary to decide it, I should have no difficulty in saying, that where a breach of the peace is committed by a freeholder, who in order to get into possession of his land assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed." In *Blades v. Higgs*¹⁰ Erle, C.J., delivering the judgment of the Court of Common Pleas accepts the view thus expressed by Parke, B., in preference to the decision in *Newton v. Harland*. In *Jones v. Foley*¹¹ a divisional court held that no action lay at the suit of a tenant holding over against his landlord, who entered and

⁶ *Pollen v. Brewer* (1859) 7 C.B. (N.S.) 371; *Turner v. Meymott* (1823) 1 Bing. 158, 25 R.R. 612; *Burling v. Read* (1850) 11 Q.B. 904.

⁷ (1840) 1 M. & G. 644; 56 R.R. 488.

⁸ (1881) 17 Ch. D. 174. See also *Edwick v. Hawkes* (1881) 18 Ch. D. 199, where the same judge reiterated his opinion on the point.

⁹ (1845) 14 M. & W. 437.

¹⁰ (1861) 10 C.B. N.S. 713.

¹¹ (1891) 1 Q.B. 730.

removed the roof of a cottage, whereby the plaintiff's furniture was damaged. The reason given for the decision, however, is that such an act does not amount to a forcible entry, which may be gravely doubted. It is submitted that the *dictum* above quoted from Baron Parke is a correct statement of the law, notwithstanding *Newton v. Harland* and *Beddall v. Mailland*. It is difficult to see how it is possible on principle to give a wrongful occupier damages for an assault which is the direct consequence of his own wrongful refusal to go out peaceably. Had he not resisted wrongfully, there would have been no assault; how then can he sue for it?

§ 49.—Defence and Recaption of Chattels.

1. Any person entitled to the possession of a chattel may defend his possession by the use of reasonable force, or may retake the chattel either peaceably or by the use of reasonable force from any person who has wrongfully taken or detained it from him. Such a retaking, even though forcible, is neither a civil injury nor a criminal offence.¹ As to the amount of force which is permissible, and as to the necessity of a precedent request, the defence and recaption of chattels is presumably governed by the same rules as the ejectment of trespassers upon land. The remedy of forcible recaption is not limited to cases of the wrongful *taking* of goods, but extends to all cases of the wrongful possession of them.²

2. It is a matter of some doubt how far the right of retaking chattels will serve to justify an entry on the land on which they are situated. It is clear, indeed, that if the occupier of the land has himself wrongfully taken and placed the goods there, the owner of them may enter and take them. But what if the occupier is in no way responsible for the presence of the goods on his land, but merely refuses to give them up, or to allow the owner to enter and take them; as in the case

¹ *Blades v. Higgs* (1861) 10 C.B. (N.S.) 713; 11 H.L.C. 621.

² *Blades v. Higgs, ubi supra*. It has been doubted, indeed, (Clerk and Lindsell on Torts, p. 152, 4th ed.), whether this remedy extends to a mere wrongful detention of a possession lawfully acquired, as in the case of a bailee refusing to return a chattel. There is no suggestion of any such limitation in *Blades v. Higgs*.

of a tenant who gives up possession of the land, but leaves a chattel behind him, and then seeks to recover it? This is a question that has more than once come before the courts, but has not yet succeeded in obtaining a definite and comprehensive answer.³

No right of
recaption un-
less property
recoverable
by legal pro-
ceedings.

3. It seems clear on principle that the right of recaption does not exist, unless there is a right to the possession of the property; and that a right to possession means, for this purpose, one that is specifically enforceable by judicial proceedings. If, therefore, the claimant cannot by way of judicial proceedings obtain specific restitution of the property, he cannot recover it by recaption either. For the courts could not suffer a man to take for himself that which he cannot obtain by way of an action. If this is so, it follows that there is no right of recaption in the following cases:—

- (a) When the right of action for damages for a conversion is barred in favour of the possessor by the statute of limitations.⁴
- (b) When, since the date of the conversion, the value of the property has been increased by the act of the possessor, or any other event has happened which would induce the courts to refuse an order for the specific restitution of the property.⁵

§ 50.—Abatement of Nuisances.

Occupier
of land may
abate a
nuisance.

1. It is lawful for any occupier of land, or for any other person by the authority of the occupier, to abate (*i.e.*, to terminate by his own act) any nuisance by which that land is injuriously affected. Thus the occupier of land may cut off the overhanging branches of his neighbour's trees, or

³ *Patrick v. Colerick* (1838) 3 M. & W. 483, 49 R.R. 696; *Anthony v. Haneys* (1832) 8 Bing. 186, 34 R.R. 670; Blackstone's Comm. III. 5; *Webb v. Beavan* (1844) 6 M. & G. 1055; *Wilde v. Waters* (1855) 16 C.B. 637. Notwithstanding the *dicta* in this last case, there can, it is submitted, be no real doubt that if the occupier of land on which the plaintiff's goods have in any manner come refuses either to deliver them or to allow the plaintiff to enter and take them, he is liable to the plaintiff in an action of trover.

⁴ *Pollock and Wright on Possession*, p. 115.

⁵ *Infra*, Ch. X. on Conversion.

sever roots which have spread from these trees into his own land.¹ So also he may pull down an obstruction to his ancient lights, remove any barrier erected elsewhere against the flow of a natural stream through his land, divert a stream of water which is wrongfully cast upon his land, break down a fence which obstructs his right of way, or put out a dangerous fire which has been lighted or suffered to burn upon the adjoining property.²

2. As sufficiently appears from these illustrations, the term nuisance, as used in the foregoing rule, includes not merely nuisances in the strict sense of that term, *viz.*, the escape of deleterious substances from the land of one man into that of another, but also the disturbance of any servitude, such as a right of way or of light, appurtenant to land.

3. Subject to certain requirements as to prior notice, which will be considered later, the right of abatement extends to the cases in which it is necessary for the abator to enter upon the land of the other party, no less than to those cases in which he can attain his purpose by acts done exclusively on his own property. Entry on land for this purpose.

4. The right of removing things that are on one's own land, such as the roots and branches of a neighbour's tree, goes further than a mere right of abating a nuisance, for it presumably exists whether the things so removed constitute an actionable nuisance or not. No action will lie for allowing a tree to overgrow one's boundary, unless it is the cause of actual damage; but there is no reason to suppose that the right of cutting the roots and branches is subject to any such limitation, for this right is simply a part of the occupier's right of exclusive possession and of doing as he pleases with his own.³

5. The right of entry and abatement presumably extends even to those exceptional cases in which, although

¹ *Lemmon v. Webb* (1894) 3 Ch. 1; (1895) A.C. 1.

² See on the whole matter: *Jones v. Williams* (1843) 11 M. & W. 176, 63 R.R. 564; *Roberts v. Rose* (1865) 4 H. & C. 103; *Penruddock's Case* (1597) 5 Co. Rep. 101; *Earl of Lonsdale v. Nelson* (1823) 2 B. & C. 302, 26 R.R. 363; *Rex v. Rosewell* (1699) 2 Salk. 459; *Lemmon v. Webb* (1894) 3 Ch. 1, (1895) A.C. 1.

³ *Smith v. Giddy* (1904) 2 K.B. 448.

a nuisance exists on the adjoining land, the occupier of that land is not responsible for it ; but in such a case a notice and request would seem to be a condition precedent to any lawful entry or abatement.⁴

6. In abating a nuisance any unnecessary damage done is an actionable wrong.⁵

No right of abatement where no injunction could be obtained.

7. It is to be assumed that there is no right of entry and abatement in a case in which, although an actionable nuisance exists, an injunction against the continuance of it could not be obtained. If, for example, a house is built which obstructs ancient lights, but to so small an extent, or under such circumstances, that no mandatory injunction would be granted to pull the house down, it cannot be supposed that the owner of the obstructed light is nevertheless at liberty to attain the same end by the exercise of his right of abatement.

In whom right vested.

8. In ordinary cases the right of abatement, like the right of action for a nuisance, is vested exclusively in the occupier of the land affected ; but there seems no reason why a similar right should not belong to the owner of a reversionary interest in the land, in those exceptional cases in which a nuisance is actionable at his suit.

Necessity of notice before abatement.

9. The question of the necessity of notice before abatement is one involved in some uncertainty. It is clear, however, that there are at least two cases in which no notice is required :—

- (a) When there is no entry on the land of the other party :
e.g., cutting roots and branches ;⁶
- (b) In case of emergency, *i.e.*, where the nuisance threatens such immediate harm to person or property that the delay involved in giving notice would be unreasonable.⁷

It seems clear also that there are two cases in which notice must be given :

⁴ See *Saxby v. Manchester & Sheffield Rly. Co.* (1869) L.R. 4 C.P. 198.

⁵ *Roberts v. Rose* (1865) 4 H. & C. 103.

⁶ *Lemmon v. Webb* (1895) A.C. 1.

⁷ *Jones v. Williams* (1843) 11 M. & W. p. 182 ; *Lemmon v. Webb* (1894) 3 Ch. p. 13.

- (a) When the nuisance was committed, not by the present occupier, but by a predecessor in title ;⁸
- (b) When the occupier is not responsible for the creation or continuance of the nuisance.

Whether notice is required in other cases is a question to which no certain reply can be given. In *Lemmon v. Webb*⁹ there is an obvious inclination to state the rule in the general form, that in all cases of entry and abatement notice is required except in case of emergency. In *Jones v. Williams*,¹⁰ on the other hand, the opinion is expressed that the requirement of notice is exceptional, and a distinction is drawn between cases in which the nuisance is created by the occupier, and those in which it is an inheritance from his predecessor in title.¹¹

10. It is lawful for any person to abate a public nuisance to a highway, so far as it is necessary to enable him to exercise his right of way thereon. Thus if a fence is unlawfully erected across a highway, or a gate wrongfully locked, any member of the public may in the exercise of his right of way remove the fence or break open the gate. And this is so even though the obstruction has been erected in the exercise of a *bona fide* but unfounded claim of right. Probably this right of abatement exists, even though the abator cannot prove that he has sustained any such special damage as is required to confer upon him any private right of action.¹²

Abatement
of nuisances
to a highway.

The right of abating a nuisance on a highway extends only to nuisances of commission, and not to those of omission so as to entitle any member of the public to undertake the repair of a highway or the creation thereon of a permanent structure, such as a bridge which he may consider necessary for the convenient exercise of his right of passage. Such

⁸ *Jones v. Williams* (1843) 11 M. & W. 176 ; 63 R.R. 564.

⁹ (1895) A.C. 1.

¹⁰ (1843) 11 M. & W. 176 ; 63 R.R. 564.

¹¹ In *Earl of Lonsdale v. Nelson* (1823) 2 B. & C. 302, 26 R.R. 363, a distinction is drawn by Best, J., between nuisances of omission and of commission, but as to this see the criticism of Lord Davey in *Lemmon v. Webb* (1895) A.C. p. 8, and the explanation of Baron Parke in *Jones v. Williams*, 11 M. & W. p. 181.

¹² *Webber v. Sparkes* (1842) 10 M. & W. 485 ; *Dimes v. Poley* (1850) 15 Q.B. 276 ; *Winterbottom v. Lord Derby* (1867) L.R. 2 Ex. 316.

acts must be done by those who are charged with the common law or statutory duty of repairing or constructing highways;^{1 2}

§ 51.—Distress Damage Feasant.

Right of distress damage feasant.

1. It is lawful for any occupier of land to seize any cattle or other chattels which are unlawfully upon his land doing damage there, and to detain them until payment of compensation for the damage done. This right is known as that of distress damage feasant, *i.e.*, the right of distraining things which are doing damage on the distrainor's land. In all ordinary cases the things so distrained are cattle or other trespassing animals, but the right extends to all chattels animate or inanimate. Thus a railway company has been held entitled to seize and detain a locomotive engine which was wrongfully encumbering its lines.¹

2. The right of distress damage feasant is vested, in general, only in the occupier of land. Mere use without exclusive possession is, it may be assumed, as insufficient to confer this right, as it is to confer the right to eject a trespasser or to sue in an action of trespass.²

No right of distress if no right of action.

3. The thing distrained must be unlawfully on the land, *i.e.*, it must be there under such circumstances that an action for damages will lie against the owner or some other person responsible for it. Where no action will lie, there can be no distress either; for example, when cattle, being lawfully driven along the highway, stray into the adjoining land, there is neither action nor right of distress, unless they are allowed to remain there for a time longer than is reasonably necessary for their removal.³ The right of action, however, need not be against the owner of the thing distrained. If the thing is present by the wrong of him who had the custody of it, or possibly even by the wrong of a mere stranger, it may be seized and detained as a security for compensation.⁴

Necessity of actual damage.

4. There must be actual damage done by the thing dis-

^{1 2} *Campbell Davys v. Lloyd* (1901) 2 Ch. 518.

¹ *Ambergate Rly. Co. v. Midland Rly. Co.* (1853) 2 E. & B. 793.

² *Cf. Burt v. Moor* (1793) 5 T.R. 329; 2 R.R. 611.

³ *Tillett v. Ward* (1882) 10 Q.B.D. 17; *Goodwyn v. Cheveley* (1859) 4 H. & N. 631.

⁴ 1 Roll. Ab. 665, Distress D.

trained; for it is rightly taken and detained only as a security for the payment of compensation, and when there is no damage done, there can be no compensation due. This damage, however, need not be done to the land itself or to things forming part of the freehold, such as crops. It is sufficient if damage is done on the land to the property or, presumably, the person of the occupier. Thus in *Boden v. Roscoe*⁵ it was held that a pony might be lawfully distrained for trespassing in a field and there kicking a filly belonging to the occupier.

5. The thing must be seized while still on the land. There is no right of following it, even in fresh pursuit, and even if it is purposely removed by its owner in order to avoid distress.⁶ Limits of
right of dis-
tress.

6. If the same thing comes more than once upon the same land it cannot be distrained or detained on a subsequent occasion in respect of damage done by it on a former visit.⁷

7. If several animals or other things belonging to the same owner trespass and do damage, each of them can be distrained and held for its own share of the damage only; one of them cannot be detained as a security for the whole claim.⁸

8. It is not lawful by way of distress damage feasant to take a thing out of the immediate personal control or use of another person; for example a horse which another person is wrongfully riding across one's land.⁹ This is an

⁵ (1894) 1 Q.B. 608.

⁶ *Vaspor v. Edwards* (1701) 12 Mod. 658; 1 Co. Inst. 161a. The *missi prius* case of *Wormer v. Biggs* (1845) 2 C. & K. 31, 80 R.R. 824, seems to have proceeded on a misapprehension of the law. The proposition that the thing distrained must be taken while actually doing the damage does not mean that it must be seized in the very act, but merely that it must be seized on the land on which it has done the damage, and not after an interval *during which it has been elsewhere*. See, for example, *Boden v. Roscoe* (1894) 1 Q.B. 608. Neither is distress damage feasant a precautionary measure against probable damage in the future, but a security for compensation for accomplished damage in the past.

⁷ *Vaspor v. Edwards* (1701) 12 Mod. p. 660. ⁸ *Ibid.* p. 660.

⁹ *Storey v. Robinson* (1795) 6 T.R. 138, 3 R.R. 137; *Field v. Adams* (1840) 12 A. & E. 649, 54 R.R. 657.

exception said to be established in the interests of the public peace. Nevertheless the occupier retains his right of forcibly removing from the land, though not of seizing and detaining, the things which a trespasser thus brings with him.

No right of sale.

9. The right of distress damage feasant includes no right of sale but merely a right to retain the thing until adequate compensation is made. Formerly the law was the same in the case of distress for rent also, but the statutes which confer a power of sale on landlords have left unaffected the common law as to distress damage feasant.

How things distrained are to be dealt with.

10. Things distrained damage feasant may at the option of the distrainor be kept by him on the premises where they were seized, or kept in his own custody elsewhere, or impounded by him in a public pound.¹⁰ By statute he is bound to provide animals impounded by him with food or water, and may sell them in order to recover the expenses so incurred by him.¹¹

Right of action suspended by distress.

11. The exercise of the right of distress damage feasant suspends the right of action for the damage complained of, so long as the detention of the property continues. Distress and action are alternative remedies which cannot be concurrently pursued. If, however, the property distrained perishes or is lost without the distrainor's fault, he is remitted to his right of action, and so also if it is restored to the owner.¹²

¹⁰ *Vaspor v. Edwards* (1701) 12 Mod. at p. 664.

¹¹ 12 & 13 Vict. c. 92. s 5; 17 & 18 Vict. c. 60. s. 1.

¹² *Vaspor v. Edwards* (1701) 12 Mod. 658; *Lehain v. Philpott* (1876) L.R. 10 Ex. 242; *Boden v. Roscoe* (1894) 1 Q.B. 608. As to the effect of tender, and the remedies of the owner for the recovery of chattels distrained damage feasant, see the following cases: *Six Carpenters Case* 8 Co. Rep. p. 147a; *Gulliver v. Cosens* (1845) 1 C.B. 788, 68 R.R. 816; *Browne v. Powell* (1827) 4 Bing. 230, 29 R.R. 538; *Sheriff v. James* (1823) 1 Bing. 341, 25 R.R. 647; *Anscomb v. Shore* (1808) 1 Camp. 285, 10 R.R. 686; *Thomas v. Harries* (1840) 1 M. & G. 695, 56 R.R. 54; *Green v. Duckett* (1883) 11 Q.B.D. 275; *West v. Nibbs* (1847) 4 C.B. 172, 72 R.R. 575. If no sufficient tender is made until after impounding in a public pound, and a sufficient tender is made thereafter and refused, the remedy of the owner is to replevy the chattels. He cannot sue in detinue or trover, nor can he pay an excessive demand and then sue for its recovery.

CHAPTER V.

TRESPASS TO LAND.

§ 52.—Old Forms of Action. Trespass and Case.

1. Under the old system of procedure the wrong of trespass to land (trespass *quare clausum fregit*) was simply a special form of the generic wrong of trespass. This is a convenient place, therefore, in which to consider the nature and scope of the old writ of trespass and its relation to other forms of action. This is an enquiry which is still necessary and profitable, notwithstanding the abolition of forms of action, for at least three reasons. In the first place, to one who is wholly ignorant of the old learning of writs and forms of action many of the older authorities on liability for civil injuries are unintelligible and misleading. Secondly, even at the present day, all satisfactory definition and classification of the different species of such injuries must be based on the old procedural distinctions between forms of action, and must conform to those distinctions except in so far as they no longer have any relation to the substantive law of the present day. Thirdly, questions as to the existence, nature, and extent of liability depend even yet in many instances on the particular kind of writ or remedy that would have been available for the plaintiff under the old practice.

2. Omitting certain special remedies of minor importance, we may say that under the old practice the ordinary remedies for torts were two in number, namely the action of *trespass* and that of *trespass on the case* (commonly called by way of abbreviation *case* simply). Trespass was the remedy for all *forcible and direct* injuries, whether to person, land, or chattels. Case, on the other hand, was a supplementary form of action,

Forms of
action: their
subsisting
importance.

Trespass
and case dis-
tinguished.

provided for all injuries not amounting to trespasses : that is to say, for all injuries which were either not forcible, or not direct but merely consequential.

Forcible injuries.

The term forcible is here used in a wide and somewhat unnatural sense to include any act of physical interference with the person or property of another. To lay one's finger on another person without lawful justification is as much a forcible injury in the eye of the law, and therefore a trespass, as to beat him with a stick. To walk peacefully across another man's land is a forcible injury and a trespass, no less than to break into his house *vi et armis*. But when there is no physical interference, there is no trespass and the proper remedy is *case* : as for example in libel, malicious prosecution, or deceit.¹

Direct and consequential injuries.

To constitute a trespass, however, it is not enough that the injury should be forcible ; it must be also direct and not merely consequential. An injury is said to be direct when it follows so immediately upon the act of the defendant that it may be termed part of that act : it is consequential, on the other hand, when by reason of some obvious and visible intervening cause, it is not regarded as part of the defendant's act but merely as a consequence of it. In direct injuries the defendant is charged in an action of trespass with having done the thing complained of ; in consequential injuries he is charged in an action of *case* with having done something else, by reason of which (*per quod*) the thing complained of has come about. In *Leame v. Bray*² the distinction is thus expressed and illustrated by Le Blanc, J. : " In all the books the invariable principle to be collected is that where the injury is immediate on the act done, there trespass lies ; but where it is not immediate on the act done, but consequential, there the remedy is in *case*. And the distinction is well instanced by the example put of a man's throwing a log into the highway ; if at the time of its being thrown, it hit any person, it is trespass ; but if after it be thrown, any person going along the road receive an injury by falling over it as it lies there, it is *case*. . . . Trespass is the proper remedy for an immediate injury done by one to

¹ Chitty's Pleading, I. 140, 7th ed.

² (1803) 3 East at p. 602.

another, but where the injury is only consequential from the act done, there it is case."

To take other illustrations of the distinction : to plant a tree with its roots across the boundary of one's own land is a trespass, but to plant a tree in one's own land and to allow it to spread its roots or branches across the boundary is no trespass, but is actionable only in *case*, if at all.³ So the act of throwing water into one's neighbour's premises is a trespass ; but to fix a spout in such a fashion that rain water is discharged by it into those premises is a mere nuisance actionable in *case*.⁴ Throwing a match whether accidentally or on purpose into another man's haystack is a trespass ; lighting a fire on one's own land, which is blown by the wind into the adjoining property and burns a haystack there, is actionable only in *case*.

3. This distinction between direct and consequential injury is not identical with that between intentional and accidental or negligent injury. These are cross divisions. Trespass lies for all direct injuries whether wilful or merely negligent. Case is the appropriate remedy for all consequential injuries, even if they are intended. This was finally settled by the case of *Leame v. Bray*,⁵ in which it was held that the act of the defendant in negligently driving his carriage so as to bring it into collision with that of the plaintiff was actionable in trespass. "There being an immediate injury from an immediate act of force by the defendant, the proper remedy is trespass, and wilfulness is not necessary to constitute trespass."^{6 7}

Trespass not necessarily an intentional injury.

³ *Lemmon v. Webb* (1894) 3 Ch. p. 11, *per* Lindley, L.J.

⁴ *Reynolds v. Clarke* (1725) 1 Str. 634 ; 2 Ld. Raym. 1399.

⁵ (1803) 3 East 593.

⁶ 3 East, p. 600.

⁷ This distinction between direct and consequential injuries does not seem to possess any logical basis. The distinction between an act and its consequences—between doing a mischief and causing one—seems to be nothing more than an indeterminable difference in degree. In popular speech every act includes within its compass certain of its more immediate consequences and excludes its more remote consequences. When I pull the trigger of a loaded gun, at what point in the infinite series of results does my act stop and its consequences begin ? In any case the distinction in question is not one which is entitled to any permanent recognition in a rational system of law, being merely an inheritance from an obsolete system of procedure

Different
senses of the
term
trespass.

4. The term trespass has been used by lawyers and laymen in three senses of varying degrees of generality. (a) In its widest and original signification it includes any wrongful act—any infringement or transgression of the rule of right. This use is common in the Authorised Version of the Bible and was presumably familiar when that version was first published. But it never obtained recognition in the technical language of the law, and is now archaic even in popular speech. (b) In a second and narrower signification the term means any legal wrong for which the appropriate remedy was a writ of trespass as already defined: *viz.*, any direct and forcible injury to persons, land, or chattels. (c) The third and narrowest meaning of the term is that in which, in accordance with popular speech, it is limited to one particular kind of trespass in the second sense, *viz.*, the tort of trespass to land (trespass *quare clausum fregit*). It is with this only that we are in the present chapter concerned.

and the product of historical accidents of development. In an exposition of our law as it stands, however, it is necessary to recognise the distinction, for the existence and extent of liability and the nomenclature and classification of civil injuries still depend upon it.

In the old practice the distinction between trespass and case was further complicated by the fact that in certain instances these two remedies were concurrent, the plaintiff having the option of suing in either form of action for the same injury. Thus when a trespass produced not only a direct but also a consequential injury, the plaintiff might sue either in trespass (alleging the consequential injury as special damage), or he might waive the trespass and sue in case for the consequential injury as the cause of action. *Scott v. Shepherd* (1772) 2 W. Bl. p. 897, *per* Blackstone, J. So also it was settled, illogically enough, that when damage was caused by negligence, the plaintiff could always sue in case, if he pleased, even though the injury was direct; yet in strict logic trespass was in such instances the exclusive remedy. *Moreson v. Hardern* (1825) 4 B. & C. 223. Where, however, the injury was wilful and direct, case was not available. Such departures from the strict application of the distinction no longer concern us, for they have left no traces in the substantive law and may now be wholly disregarded. On the whole matter see also *Holmes v. Mather* (1875) L.R. 10 Ex. p. 268; *Morley v. Gaisford* (1795) 2 H.Bl. 441, 3 R.R. 432; *Hopper v. Reeve* (1817) 7 Taunt. 698, 18 R.R. 629; *Ogle v. Barnes* (1799) 8 T.R. 188, 4 R.R. 630; *Scott v. Shepherd* (1772) 2 W. Bl. 892. The dissenting judgment of Blackstone, J., in this case must be taken to be correct in principle.

§ 53.—The Nature of Trespass to Land.

1. The wrong of trespass to land (trespass *quare clausum* ^{Trespass} *fremit*) consists in the act of (a) entering upon land in the possession of the plaintiff, or (b) remaining upon such land, ^{*quare clausum/fremit* defined.} or (c) placing any material object upon it—in each case without lawful justification.

2. *Trespass by wrongful entry.* The commonest form of Entry. trespass consists in a personal entry by the defendant, or by some other person through his procurement, into land or buildings occupied by the plaintiff. The slightest crossing of the boundary is sufficient : *e.g.*, to put one's hand through a window, or to sit upon a fence. Nor indeed does it seem essential that there should be any crossing of the boundary at all, provided that there is some physical contact with the plaintiff's property.¹

3. This and all other forms of trespass to land are action- ^{Trespass} ^{actionable} *per se* without any proof of damage.² If the entry is intentional, it is actionable even though made under an inevitable mistake of law or fact,³ and therefore an action of trespass may be used to determine a disputed title to land. An accidental, as opposed to a mistaken entry, on the other hand, is not actionable unless due to negligence. No action will lie against a defendant whose horse runs away with him on a public highway, and carries him without any negligence of his upon the adjoining land of the plaintiff.⁴

4. Even he who has a right of entry on the land of another ^{Trespass by} for a specific purpose commits a trespass if he enters for any ^{abuse of} other purpose. The chief application of this rule is the abuse ^{right of} of a right of way, public or private ; but presumably the same principle applies to all rights of entry. A public highway is a piece of land vested either in some local authority or in the adjoining landowners, and subject to a public right of way. Any person, therefore, who uses a highway for any

¹ Cf. *Gregory v. Piper* (1829) 9 B. & C. 591 ; 33 R.R. 268.

² *Ashby v. White*, 2 Ld. Raym. p. 955, *per* Holt, C.J.

³ *Basely v. Clarkson* (1682) 3 Lev. 37.

⁴ See *Stanley v. Powell* (1891) 1 Q.B. 86 ; *Holmes v. Mather* (1875) L.R. 10 Ex. 261. These are cases of trespass to the person, but there is no reason to doubt that the principle applies generally to all forms of trespass.

purpose other than that of passage (including the subordinate purposes reasonably and ordinarily incident to passage), becomes thereby a trespasser against the owner of the soil, and like any other trespasser may be either sued in trespass or forcibly ejected. Thus it is a trespass to depasture one's cattle on the highway,⁵ or to go there for the purpose of interfering with the adjoining occupier's right of shooting,⁶ or of watching what is being done on the adjoining land.⁷

It is not necessary that the thing so done in abuse of the right of entry should be the cause of any harm to the occupier of the land or to any one else. It is enough that it falls outside the purpose for which the right is conferred. But if the act done on the land is within that purpose, it does not matter what ulterior object the defendant may have in exercising his right of entry. Thus it is not a trespass to walk along a highway with the object of committing a crime elsewhere.⁸ Moreover even a wrongful act done upon the land itself does not make the defendant a trespasser within the present rule, unless it can be shown that he entered for that purpose. If he entered for a lawful purpose, he is no trespasser unless the case is one to which the doctrine of trespass *ab initio* applies.⁹

Trespass by
remaining on
land.

5. *Trespass by remaining on land.* Even a person who has lawfully entered on land in the possession of another, commits a trespass if he remains there after his right of entry has ceased. To refuse or omit to leave the plaintiff's land is as much a trespass, as to enter originally without right. Thus any person who is present by the leave and license of the occupier, may on the termination of that license be sued or ejected as a trespasser, if after request he fails to leave the premises.¹⁰

Wrongful
possession no
trespass.

This case must be distinguished from that of a person lawfully in possession of land, who refuses or omits to give it up on the termination of his lease or other interest. A lessee

⁵ *Dovaston v. Payne* (1795) 2 H. Bl. 527; 3 R.R. 497.

⁶ *Harrison v. Duke of Rutland* (1893) 1 Q.B. 142.

⁷ *Hickman v. Maisey* (1900) 1 Q.B. 752.

⁸ *Harrison v. Duke of Rutland* (1893) 1 Q.B. p. 158, *per* Kay, L.J.

⁹ *Hickman v. Maisey* (1900) 1 Q.B. at p. 757, *per* Collins, L.J.

¹⁰ *Winterbourne v. Morgan* (1809) 11 East 395, 10 R.R. 532; *Playfair v. Musgrove* (1845) 14 M. & W. 239, 69 R.R. 690; *Ash v. Dawney* (1852) 8 Ex. 237; *Wood v. Leadbitter* (1845) 13 M. & W. 838, 67 R.R. 831.

holding over is no trespasser ; for a trespass can be committed as we shall see, only against the person in the present possession of the property.¹¹

6. *Trespass by placing things on land.* It is a trespass to cause any physical object to cross the boundary of the plaintiff's land, or even to come into physical contact with the land, even though there may be no crossing of the boundary ; for example, to turn cattle upon the land, or to throw stones upon it, or to drive nails into a wall, or to pile rubbish against it.¹²

Trespass by placing things on land.

In all such cases, in order to be actionable as a trespass the injury must be *direct*, within the meaning of the distinction between direct and consequential injuries which has been already explained as determining the line between trespass and case. It is a trespass, and therefore actionable *per se*, directly to place material objects upon another's land ; it is not a trespass, but at the most a nuisance or other wrong actionable only on proof of damage, to do an act which consequentially results in the entry of such objects. To throw stones upon one's neighbour's premises is the wrong of trespass ; to allow stones from a ruinous chimney to fall upon those premises is the wrong of nuisance.¹³

7. That trespass by way of personal entry is a *continuing* injury, lasting as long as the personal presence of the wrongdoer, and giving rise to actions *de die in diem* so long as it lasts, is sufficiently obvious. "A continuation of every trespass is in law a new trespass."¹⁴ It is well settled,

Continuing trespasses.

¹¹ *Hey v Moorhouse* (1839) 6 Bing. N.C. 52, 54 R.R. 717 ; *Newton v. Harland* (1840) 1 M. & G. p. 659, 56 R.R. p. 499.

¹² Chitty's Pleading, I. 199, 7th ed. ; *Pickering v. Rudd* (1815) 4 Camp. p. 220, 16 R.R. p. 778 ; *Gregory v. Piper* (1829) 9 B. & C. 591, 33 R.R. 268.

¹³ It is true that under the old practice the wrong of allowing cattle to stray into another's land was dealt with by writ of trespass, but this must be regarded as an anomaly. Chitty's Pleading, I. 202, 7th ed. To *drive* cattle upon another's land is a true trespass ; to *allow* them by default of fencing or watching to escape into another's land is not in truth a trespass, but a nuisance, and in strictness the remedy ought to have been in case. It is impossible logically to class the escape of cattle as a trespass, and the escape of water as a nuisance. There seems no sufficient reason to suppose that the straying of cattle is actionable *per se*, any more than any other kind of nuisance is.

¹⁴ *Winterbourne v. Morgan* (1809) 11 East p. 405 ; 10 R.R. p. 537.

however, that the same characteristic belongs in law even to those trespasses which consist in placing things upon the plaintiff's land. Such a trespass continues until it has been abated by the removal of the thing which is thus trespassing ; successive actions will lie from day to day until it is so removed ; and in each action damages (unless awarded in lieu of an injunction) are assessed only up to the date of the action.¹⁵ Whether this doctrine is either logical or convenient may be a question, but it has been repeatedly decided to be the law. Thus in *Holmes v. Wilson*¹⁶ the defendants, highway authorities, supported a road by building buttresses for it on the plaintiff's land, who sued in trespass and accepted money paid into court in full satisfaction. Yet it was held that this was no bar to a subsequent action between the same parties for the further continuance of the buttresses there. So in *Hudson v. Nicholson*¹⁷ the defendant wrongfully placed certain timbers on the adjoining land in order to support his house. This land having been subsequently purchased by the plaintiff, he was held entitled to sue in trespass for the continuance of the timbers on his property, although, since he was not at that time the owner, he could not sue for the act of putting them there.¹⁸

These cases of continuing trespass must be distinguished from cases of the continuing *consequences* of trespass which is over and done with. If I trespass on another's land, and make an excavation there, the trespass ceases so soon as I leave the land, and does not continue until I have filled the excavation up again. Consequently only one action will lie, and in it full damages are recoverable for both the past and the future.¹⁹ *Aliter* if I have brought a heap of soil and left it on the plaintiff's land.

Trespass
beneath the
surface.

8. In general he who owns or possesses the surface of land owns or possesses all the underlying *strata* also.²⁰ Any entry beneath the surface, therefore, at whatever depth, is an

¹⁵ *Supra* pp. 116, 118.

¹⁶ (1839) 10 A. & E. 503.

¹⁷ (1839) 5 M. & W. 437

¹⁸ See also *Bowyer v. Cooke* (1847) 4 C.B. 236

¹⁹ *Clegg v. Dearden* (1848) 12 Q.B. 576.

²⁰ *Corbett v. Hill* (1870) L.R. 9 Eq. p. 673. As to the ownership of the subsoil of highways see *Coverdale v. Charlton* (1878) 4 Q.B.D. 104 : *Mayor of Tunbridge Wells v. Baird* (1896) A.C. 434.

actionable trespass ; as when the owner of an adjoining coal mine takes coal from under the plaintiff's land. Where the possession of the surface has become separated from that of the subsoil (as by a conveyance of the subsoil for mining purposes, reserving the surface) any infringement of the horizontal boundary thus created is a trespass.

9. It is commonly said that the ownership and possession of land bring with them the ownership and possession of the column of space above the surface *ad infinitum*. *Cuius est solum, ejus est usque ad coelum*.²¹ This is doubtless true to this extent, that the owner of land has the right to use for his own purposes, to the exclusion of all other persons, the space above it *ad infinitum*. He may build the Tower of Babel if he pleases, and may remove all things situated above the surface, even though they are the property of others, and though their presence there does him no harm and is no wrong for which he has any right of action against their owners. Thus he may cut the overhanging branches of a tree growing in his neighbour's land whether they do him harm or not ;²² yet he has no right of action against the owner of the tree unless he can show actual damage.²³ So he may cut and remove a telegraph or other electric wire stretched through the air above his land, at whatever height it may be, and whether he can show that he suffers any harm or inconvenience from it or not.²⁴

It does not follow from this, however, that an entry above the surface is in itself an actionable trespass ; nor is there any sufficient authority that this is so. Such an extension of the rights of a landowner would be an unreasonable restriction of the right of the public to the use of the atmospheric space above the earth's surface. It would make it an actionable wrong to fly a kite, or send a message by a carrier pigeon, or ascend in a balloon, or fire artillery, even in cases where no actual or probable damage, danger, or inconvenience could be proved by the subjacent landowners. The state of the author-

²¹ Co. Litt. 4a ; *Corbett v Hill* (1870) L.R. 9 Eq. 671.

²² *Lemmon v. Webb* (1895) A.C. 1.

²³ *Smith v. Giddy* (1904) 2 K.B. 448.

²⁴ *Wandsworth Board of Works v. United Telephone Co.* (1884)

13 Q.B.D. p 927, *per Fry*, L.J.

ities is such that it is impossible to say with any confidence what the law on this point really is. It is submitted, however, that there can be no trespass without some physical contact with the land (including, of course, buildings, trees, and other things attached to the soil), and that a mere entry into the air space above the land is not an actionable wrong unless it causes some harm, danger, or inconvenience to the occupier of the surface. When any such harm, danger, or inconvenience does exist, there is a cause of action in the nature of a nuisance.²⁵

§ 54.—The Title of the Plaintiff.

Plaintiff
must be in
possession.

1. A trespass is actionable only at the suit of him who is in possession of the land. This form of injury is essentially a violation of the right of possession, not of the right of property. It is a disturbance of the right of exclusive use vested in the occupier of land. Ownership unaccompanied by possession is protected by other remedies, but not by an action of trespass.¹ Thus a landlord cannot sue for a mere trespass to land in the occupation of his tenant; such an action can be brought only by the tenant. The landlord has

²⁵ In *Pickering v. Rudd* (1815) 4 Camp. 219, 16 R.R. 777, trespass was brought for the fixing by the defendant on his own land of a board which projected into the space above the plaintiff's land. But Lord Ellenborough said: "I do not think it is a trespass to interfere with the column of air superincumbent on the close. . . . If this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage. . . . If any damage arises from the object which overhangs the close the remedy is by an action on the case." On the other hand in *Wandsworth Board of Works v. United Telephone Co.* (1884) 13 Q.B.D. 904, it seems to have been assumed by the Court of Appeal that any entry into the space above a plaintiff's land is actionable as a trespass *per se*. See pp. 915, 919, 927. See also *Kenyon v. Hart* (1865) 6 B. & S. p. 252 *per* Blackburn, J. In *Fay v. Prentice* (1845) 1 C.B. 828, 68 R.R. 823, *Baten's Case*, 9 Rep. 53, and *Penruddock's Case*, 5 Rep. 100, projections over the plaintiff's land were dealt with as nuisances, not as trespasses. As to things placed over a public highway, see *Wandsworth Board of Works v. United Telephone Co.* (1884) 13 Q.B.D. 904.

¹ *Cooper v. Crabtree* (1882) 20 Ch. D. 589; *Wallis v. Hands* (1893) 2 Ch. 75; *Harrison v. Blackburn* (1864) 17 C.B. N.S. 678; *Turner v. Cameron's Coal Co.* (1860) 5 Ex. 932.

no right of action unless he can prove more than a mere trespass, *viz.*, actual harm done to the property, of such sort as to affect the value of his reversionary interest in it.²

2. For the same reason the mere *use* of land, without the exclusive possession of it, is not a sufficient title to found an action of trespass for the disturbance of that use. Thus in general a lodger or boarder has no possession of the room in which he is lodged, and cannot sue in trespass for any disturbance of his use of it.³ So with a guest at an inn or in a private house, or with a domestic servant or other member of a household. So also with the use of a seat in a theatre or a railway carriage, or the right to post advertisements on a wall or hoarding. Whether a person having thus the use of land without the possession of it has any remedy at all against a stranger who disturbs him, is a question which we shall consider later. In the meantime it is enough to note that he cannot sue as for a trespass to land, or exercise the rights of self-help available in the case of trespassers.⁵

Use of land without possession not sufficient.

3. The mere *de facto* and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves, and is therefore sufficient to support an action of trespass against such persons. Just as a legal title to land without the possession of it is insufficient for this purpose, so conversely the possession of it without legal title is enough. In other words no defendant in an action of trespass can plead the *jus tertii*—the *right* of possession outstanding in some third person—as against the *fact* of possession in the plaintiff.⁶ *Adversus extraneos vitiosa possessio prodesse solet.* It is otherwise of course if the defendant has done the act complained of by the authority, precedent or subsequent, of him who is thus rightfully entitled.

Jus tertii no defence in action of trespass.

4. *Trespass by relation.* He who has a right to the immediate possession of land, and enters in the exercise of that right, is then deemed by a legal fiction to have been in possession by relation.

² The rights of reversionary owners will be considered in a later chapter.

³ *Allan v. Liverpool* (1874) L.R. 9 Q.B. p. 191. ⁵ *Supra*, p. 143.

⁶ *Graham v. Peat* (1801) 1 East 244, 6 R.R. 268; *Chambers v. Donaldson* (1809) 11 East 65; 10 R.R. 435; *Corporation of Hastings v. Ivall* (1874) L.R. 19 Eq. at p. 585.

sion ever since the accrual of his right of entry, and may accordingly sue for any trespass committed since that time. This is known as the doctrine of trespass by relation, because the plaintiff's possession relates back to the time when he first acquired a right to the possession. Since the abolition of forms of action the rule has lost most of its importance ; but as it still in certain cases affects the substantive law, it cannot be disregarded as obsolete.

Thus a person wrongfully disseised of his land may after re-entry sue for any trespass committed on the land during the period of his dispossession. So a lessee may sue for a trespass done between the granting of the lease and his entry in pursuance of it. So a landlord entitled to re-enter after the termination of the lease may after re-entry sue for any trespass committed since the lease determined. We shall see in the next chapter how the action for mesne profits in case of dispossession is founded on this same rule of trespass by relation.

" Before entry and actual possession," says Blackstone,⁷ " one cannot maintain an action of trespass, though he hath the freehold in law. And therefore an heir before entry cannot have this action against an abator ; though a disseisee might have it against the disseisor for the injury done by the disseisin itself, at which time the plaintiff was seized of the land ; but he cannot have it for any act done after the disseisin, until he hath gained possession by re-entry ; and then he may well maintain it for the intermediate damage done ; for after his re-entry the law by a kind of *jus post-liminii* supposes the freehold to have all along continued in him." So in *Newton v. Harland*⁸ Bosanquet, J., says : " The lessor who is out of possession cannot maintain an action of trespass against the tenant holding over. He must first acquire a lawful possession, before he can maintain such action. But if the lessor enters upon the land to take possession, he may treat as trespassers all those who afterwards come upon it, or who having unlawfully taken possession wrongfully continue upon the land." So in *Anderson v. Radcliffe*⁹ it is

⁷ Comm. III. 210. ⁸ (1840) 1 M. & G. p. 659 ; 56 R.R. p. 499.

⁹ (1860) 29 L. J. Q.B. p. 128.

said: "When once there is an entry by the person having title, we look to the date when the title accrued and consider him in possession from that time for the purposes of the action of trespass."¹⁰

§ 55.—Trespass *ab Initio*.

1. He who enters on another's land by authority of law, and is subsequently guilty of an abuse of that authority by committing a wrong of misfeasance against that person, is deemed to have entered without authority, and is therefore liable as a trespasser *ab initio* for the entry itself and for all things done by him thereunder which cannot be justified save as done under lawful entry.

2. This rule, which is known as that of trespass *ab initio*, applies not merely to entry upon land, but to all other acts which, unless done by some special authority of law, would have amounted under the old practice to the wrong of trespass, whether to the land, goods, or person of another: for example, the seizure of cattle damage feasant. If such an authority is subsequently abused by doing a wrongful act under cover of it, it is cancelled *ab initio* or retrospectively and deemed never to have existed, so that the exercise of it becomes actionable as a trespass. In other words, in an action of trespass to land, goods, or person, a plea that the act was done under authority of law may be effectively met by a replication that the authority was subsequently abused.

3. The leading authority for this doctrine is the case known as the *Six Carpenters' Case*, reported by Coke. There it is said:¹ "When an entry, authority, or licence is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*. . . The law gives authority to enter into a common inn or tavern; so to the lord to distrain; to the owner of the ground to distrain damage feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle; and such like. But if he who enters into the

Six carpenters' case.

¹⁰ See also *Barnett v. Earl of Guildford* (1855) 11 Ex. 19; *Litchfield v. Ready* (1850) 5 Ex. 939; *Butcher v. Butcher* (1827) 7 B. & C. 399, 31 R.R. 237; *Hey v. Moorhouse* (1839) 6 Bing. N.C. 52, 54 R.R. 717; *Ocean Accident Corporation v. Ilford Gas Co.* (1905) 2 K.B. 493.

¹ (1610) 8 Co. Rep. 146a. Smith's L.C. I. 132, 11th ed.

inn or tavern doth a trespass, as if he carries away anything or if the lord who distrains for rent or the owner for damage feasant works or kills the distress ; or if he who enters to see waste breaks the house or stays there all night ; or if the commoner cuts down a tree ; in these and the like cases the law adjudges that he entered for that purpose ; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*. So if a purveyor takes my cattle by force of a commission for the King's house, it is lawful ; but if he sells them in the market, now the first taking is wrongful."

Effects of
the rule.

4. The rule is primarily one of procedure, the effect of it under the old practice being that a writ of trespass would lie for the entry or seizure itself, instead of a writ of trespass or of case for the subsequent abuse only. In this respect the rule has now lost its significance, but its secondary effect upon the substantive law still remains, *viz.*, that it enables the plaintiff to recover damages for the entire transaction, and not merely for the wrongful portion of it. If for example, the defendant rightfully seizes the plaintiff's horse damage feasant, but subsequently injures or sells it, he is liable in damages for the seizure itself in an action which under the old practice would have been trespass *de bonis asportatis*.² It is to be regretted that a legal fiction due to the misplaced ingenuity or some medieval pleader should have thus succeeded in maintaining its existence and oppressive operation in modern law. It has been abolished by statute in the case of distress for rent and in certain other instances, but it ought to be wholly eliminated from the law.

Limits of the
rule.

5. The rule applies only to acts done in pursuance of an "entry, authority, or licence given to any one by the law," as in the examples already given in the extract from the *Six Carpenters' Case*. "Where an entry, authority, or licence is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*."³

6. The rule applies only when the subsequent abuse amounts to a positive wrongful act, as opposed to a mere omission or non-feasance. Thus in the *Six Carpenters' Case* itself it was

² *Oxley v. Watts* (1785) 1 T.R. 12 ; 1 R.R. 133 ; *Bagshaw v. Goward*, Cro. Jac. 147.

³ *Six Carpenters' Case* 161(a) 8 Rep. 146b.

resolved that the defendant was not a trespasser *ab initio* merely because he refused to pay for the quart of wine and the pennyworth of bread which he bought and consumed in the plaintiff's inn. For the same reason it is not trespass *ab initio* to refuse to deliver up a distress after payment or tender of the rent or compensation due to the distrainor. The remedy is trover, detinue, or replevin, not trespass.⁴ So a sheriff is not a trespasser *ab initio* because he wrongfully omits to discharge at the proper time a prisoner in his custody.^{5 6}

7. The rule of trespass *ab initio* does not apply to irregularities committed in the course of an otherwise lawful distress for rent, for it has been abrogated in this particular case by statute.⁷ To distress damage feasant, however, the old law still applies.⁸

⁴ *West v. Nibbs* (1847) 4 C.B. 172; 72 R.R. 575.

⁵ *Smith v. Egginton* (1837) 7 A. & E. 167.

⁶ It has been suggested in consequence of expressions used in the *Six Carpenters' Case* that the true distinction is not between misfeasance and nonfeasance, but between acts which do and those which do not under the old practice amount to trespass. It is difficult, however, to reconcile such an interpretation with the authorities. To work a horse which has been lawfully seized damage feasant is not in itself a trespass, but it clearly makes the distrainor a trespasser *ab initio*. *Oxley v. Watts* (1785) 1 T.R. 12; 1 R.R. 133. Conversely, to remain on premises after the determination of a right of entry is a trespass, and yet it seems the better opinion that it does not amount to a trespass *ab initio*. It is impossible, however, to reconcile all the *dicta* or even all the decisions on this most confused and unsatisfactory branch of law.

⁷ 11 Geo. II. c. 19, s. 19.

⁸ It seems that a lawful entry does not become by abuse a trespass *ab initio*, unless that abuse has reference to and so takes away the entire ground and reason of the entry. If there remains any independent ground or reason of entry, which is unaffected by the abuse, it will suffice to justify the entry and protect it from the rule of trespass *ab initio*. Thus if a landlord enters lawfully to distrain, and seizes several chattels, some of which are properly distrainable, and some of which are not, he is not even at common law a trespasser *ab initio* by reason of this abuse; for it does not go to the whole justification of his entry. He can still justify it by reference to the chattels which he has lawfully distrained. *Harvey v. Pocock* (1843) 11 M. & W. 740; 63 R.R. 741. On the same principle if all the chattels seized were lawfully distrainable, but he subsequently committed an illegal act with respect to some of them, he would not, even before the Distress for Rent Act, have been a trespasser *ab initio* with respect to all. *Dod v. Monger* (1704) 6 Mod. 215. If such cases are carried out to their logical consequences, they cut down considerably the doctrine of trespass *ab initio* as it was understood in the time of the six carpenters.

§ 56.—The Measure of Damages in Trespass.

Ordinary
measure of
damages.

1. When a trespass has caused physical damage to the land, the measure of damages is the loss thereby caused to the plaintiff, which in all ordinary cases is measured by the resulting diminution in the value of the property. The measure of damages is not the cost of reinstatement—the cost of restoring the land to the condition in which it formerly was—a cost which may greatly exceed the actual diminution in the value of the land. Thus if soil is wrongfully removed from the plaintiff's land, he cannot recover the cost of supplying its place with new soil; nor if an old building is pulled down, can he recover the cost of putting up a new one, but merely the value of the old.¹

Damages re-
coverable by
occupier
without title.

2. We have already seen that in an action of trespass *de facto* possession is a good title as against a wrongdoer.² What, then, is the measure of damages in such a case? Is a mere possessor without lawful title enabled not only to sue a wrongdoer in trespass, but also to recover the same damages as if he were the lawful owner? On this point there is no authority, but there seems to be no reason why the rule in the case of land should be different from the rule in the case of chattels; and in the latter case it is well established law that a possessor recovers the same damages as an owner.³

Damages re-
coverable by
occupier with
limited in-
terest.

3. When a tenant or other person in rightful occupation of land with a limited interest in it sues in trespass, what is the measure of damages? Is it the damage done to his own limited interest, or is it the whole damage done to the land? On this point there seems to be no adequate authority; but it is settled that the bailee of chattels can recover in trespass or trover the whole value of the property, and not merely the value of his interest in it (holding the surplus in trust for the owner or other persons interested in the property);⁴ and there

¹ *Witham v. Kershaw* (1886) 16 Q.B.D. 613; *Jones v. Gooday* (1841) 8 M. & W. 146, 58 R.R. 649; *Wigsell v. School for Indigent Blind* (1882) 8 Q.B.D. 357; *Hosking v. Phillips* (1848) 3 Ex. 168, 77 R.R. 579; cf. *Wednesbury Corporation v. Lodge Holes Colliery* (1903) 1 K.B. 78.

² *Armory v. Delamirie* (1721) 1 Str. 505. See *The Winkfield* (1902) P. 42.

³ *Supra*, p. 165.

⁴ *The Winkfield* (1902) P. 42. As to trespass to land, see *Twyman v. Knowles*, (1853) 13 C.B. 222, but note that the defendant was him-

seems to be no reason why the occupier of land should be in a different position. If a plaintiff in wrongful possession of land without any title at all can recover full damages, a plaintiff in rightful possession with a limited interest cannot be in a worse position.

4. When a trespass consists in some beneficial use wrongfully made of the plaintiff's land, even if it causes no damage, the plaintiff is entitled to claim by way of damages a reasonable remuneration for that use, as if it had been had under an agreement; and in this remuneration compensation for any damage done to the land will be included. Thus in *Whitwham v. Westminster Brymbo Coal Co.*⁵ the defendant company had for a considerable period made use of the plaintiff's land for the purpose of tipping upon it the spoil from their colliery, so that the land was rendered useless for any other purpose. It was held by the Court of Appeal that the proper measure of damages was not the mere market value of the land, but the amount which the defendants would have had to pay the plaintiffs by way of reasonable remuneration for such use of the land under a contract; that is to say, the value of the land for tipping purposes to the defendants themselves. "If one person," says Lindley, L.J.,⁶ "has without leave of another been using that other's land for his own purposes, he ought to pay for such user." And according to Rigby, L.J.:⁷ "The principle is that a trespasser shall not be allowed to make use of another person's land without in some way compensating that other person for that user." The same principle applies to the unlawful use of a way over another's land; even though no harm has been done to the land, a reasonable rent for such a way may be recovered as damages.⁸

Compensation for beneficial use of land.

5. When part of the land has been wrongfully severed and turned into a chattel, the value of that chattel is sometimes greater and sometimes less than the resulting diminution in the value of the land. To remove fixtures from a building will probably diminish the value of the building by a greater

Wrongful severance of chattels.

self the lessee of the land, and therefore could not be liable except to the extent of the plaintiff's interest.

⁵ (1896) 2 Ch. 538

⁶ At p. 541.

⁷ At p. 543.

⁸ *Jegon v. Vivian* (1871) L.R. 6 Ch. 742; *Phillips v. Homfray* (1871) L.R. 6 Ch. 770.

amount than the fixtures are worth after removal ; but coal hewed out of a seam is worth more than it was when *in situ*. In such cases what is the measure of damages—the value of the chattels so taken away, or the resulting diminution in the value of the land ? The rule is that in all cases of wilful wrongdoing the plaintiff may elect to claim either the one or the other, and he will of course claim the amount which is the larger in the particular case. The reason is that he has two alternative causes of action—he may sue either for the injury to the land or for the conversion of the chattel severed and taken away, and the measure of the damages in these two cases is different. The chattel, although it has been severed and made into a chattel by the labour and expenditure of the defendant, nevertheless belongs to the plaintiff, who may recover its full value without making any allowance for the fact that part of that value has been given to it by the defendant.

The value so recoverable is the value of the chattel at the moment when it first becomes a chattel ; and if subsequently the defendant has by his labour or expenditure increased its value, the plaintiff has no claim to this addition. So that if coal is wrongfully extracted by the defendant from the plaintiff's land, he is entitled to recover the value of the coal at the pit's mouth, less the cost of drawing and raising it, but without any deduction of the cost of hewing or procuring it.⁹

This penal rule, by which the plaintiff recovers more than his actual loss, does not apply where there is no fraud or conscious wrongdoing on the part of the defendant, and where he has been guilty merely of an honest mistake. In such a case the plaintiff cannot recover the value of the chattel, and is entitled to nothing more than his actual loss, *viz.*, the diminution of the value of the land. So that if the plaintiff's coal is severed and taken by a mistake as to title or boundaries, the measure of damages is the value of the coal in the seam, as if it had been bought *in situ* by the defendant.¹⁰ Whether

⁹ *Martin v. Porter* (1839) 5 M. & W. 351, 52 R.R. 745 ; *Taylor v. Mostyn* (1886) 33 Ch.D. 226 ; *Wild v. Holt* (1842) 9 M. & W. 672, 60 R.R. 860 ; *Morgan v. Powell* (1842) 3 Q.B. 278, 61 R.R. 228.

¹⁰ *Wood v. Morewood* (1841) 3 Q.B. 440 n., 61 R.R. 234 ; *Jegon v. Vivian* (1871) L.R. 6 Ch. 742 ; *Trotter v. Maclean* (1879) 13 Ch.D. 574 ; *Livingstone v. Rawyards Coal Co.* (1880) 5 A.C. 25 ; *Peruvian Guano Co. v. Dreyfus Bros.* (1892) A.C. pp. 173-177.

the penal measure of damages applies in the case of negligence, as well as in that of fraud, is perhaps to be regarded as unsettled. There are certain *dicta* in favour of its application to such a case.^{11 12}

¹¹ See the cases cited in the preceding note.

¹² These principles have been worked out by the courts with exclusive reference to the wrongful extraction of coal, but there seems no reason to doubt that they are of general application to all forms of wrongful severance and conversion. See *Peruvian Guano Co. v. Dreyfus Bros.* (1892) A.C. p. 176, *per* Lord Macnaghten.

CHAPTER VI.

DISPOSSESSION OF LAND.

§ 57.—The Action of Ejectment.

Dispossession defined.

1. The wrong of dispossession consists in the act of depriving any person entitled thereto of the possession of land. This deprivation of possession may happen in two ways, namely, either by wrongfully *taking* possession of the land, or by wrongfully *detaining* the possession of it after the expiration of a lawful right of possession. In the first case the wrong of dispossession is also a trespass; in the latter it is not. But so far as regards the essential nature of the wrong and the remedies available for it, there is no difference between one form of dispossession and the other.¹

The action of ejectment.

2. Any person wrongfully dispossessed of land may sue for the specific restitution of it in an action of ejectment. This action was in its origin merely a special variety of the action of trespass (whence its full title—*trespass in ejectment*), and was available only for leaseholders. It was the remedy by which a tenant for a term of years recovered the possession of the land either from his landlord or from any other person who had dispossessed him. So greatly, however, did it exceed in convenience and efficiency the remedies available for freeholders, that it came in course of time and by the aid of the most elaborate fictions to be used by freeholders also, superseding all other remedies and becoming the universal means by which the possession of land could be recovered by any person having title to it.²

¹ In the days of Blackstone it was necessary to distinguish between many different forms of dispossession, or ouster as it was called, *viz.*, abatement, intrusion, disseisin, discontinuance, deforcement, dispossession of a leasehold, and so on. Blackstone III. 167. All these distinctions have become immaterial.

² The action when brought by a freeholder was instituted in the name of a fictitious plaintiff, usually called John Doe, who claimed

3. *The rule in Asher v. Whitlock.* In an action of ejectment it is necessary for the plaintiff to prove his right to the possession of the land, but it is sufficient if he proves a better right than the defendant's, even though it is inferior to that of some third person. For the purpose of this rule, as between two wrongful possessors priority of possession gives the better right. The defendant in ejectment cannot defend himself by pleading *jus tertii*, that is to say the existence of a title superior to that of the plaintiff and vested in some third person. In an action between A and B for the possession of land, it is an irrelevant fact that the real owner of the land is neither A nor B, but C.

Possessory
titles.
Asher v.
Whitlock.

When the real ownership is thus outstanding in some third person, the rights of the two claimants to it depend on priority of possession. *Qui prior est tempore potior est jure.* He who had the land first in fact has the best right to it in law. And so also with any one who claims through or under the prior possessor, as purchaser, lessee, devisee, heir at law, and so on. In other words possession of land, even though wrongful, is a title of right as against all persons who cannot show a better title in themselves. Such possessory ownership—ownership based on possession—has, except as against persons able to show a better title in themselves, all the characteristics of legal ownership. The possessory owner may sell, lease, mortgage, or devise the land, and on his death intestate it will descend like a legal title; and any person so claiming under the possessory owner has as good a title as he had.

This rule as to possessory title in actions of ejectment was

possession of the land under a fictitious lease, which the real claimant (the plaintiff's lessor, as he was termed) was alleged to have granted to him. Hence the name of an action of ejectment under the old procedure *Doe on the demise of Robinson v. Johnson*. The defendant was permitted to defend the action, only on the terms of admitting the alleged lease and the dispossession of the plaintiff, so that the only question left in issue was the title of the plaintiff's lessor (that is to say, the real plaintiff) to the land in question. These fictions were all swept away by the Common Law Procedure Act, 1852; and by the Judicature Act, 1873, even the term ejectment is superseded by the term action for the possession of land. The older term is, however, conveniently retained in practice. For an account of the history and nature of ejectment under the old practice see Blackstone, III. 199–207.

definitely formulated in the case of *Asher v. Whitlock*,³ and this decision, although long doubtful, may now be regarded as authoritative in consequence of the express recognition of the rule by Lord Macnaghten, delivering the judgment of the Privy Council in *Perry v. Clissold*.⁴ "It cannot be disputed," he says,⁵ "that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner." We have already seen that such a possessory title is sufficient to enable a plaintiff to sue in trespass,⁶ and we shall see later that the law is the same in the case of injuries to chattels.⁷

§ 58.—The Action for Mesne Profits.

Recovery of
mesne pro-
fits.

1. Any person wrongfully dispossessed of land has, in addition to a right of action in ejectment for the recovery of the land, a right of action for damages in respect of all loss suffered by him during the period of his dispossession. Such an action is termed an action for mesne profits.

Mesne profits
may be
claimed in
ejectment.

2. A claim for mesne profits is now usually joined with the action of ejectment, this joinder being permitted by the Rules of the Supreme Court, O. 18, r. 2. Formerly, however, this was not allowable (save by virtue of the Common Law Procedure Act, 1852,¹ in the single case of ejectment brought by a landlord against his tenant); and the practice was to sue first in ejectment and after the recovery of the land by this means, to bring a subsequent action for mesne profits.²

³ (1865) L.R. 1 Q.B. 1. See also *Allen v. Rivington* (1671) 2 Wms. Saund. 110; *Davison v. Gent* (1857) 1 H. & N. 744.

⁴ (1907) A.C. 73. The cases of *Doe d. Crisp v. Barber* (1788) 2 T.R. 749, 1 R.R. 611, *Doe d. Carter v. Barnard* (1849) 13 Q.B. 945, 78 R.R. 564, and *Nagle v. Shea* (1874) Ir. Rep. 8 C.L. 224, must be taken to be erroneous. According to these cases possession is merely *prima facie* evidence of a legal title, not a title in itself, even against an admitted wrongdoer.

⁵ (1907) A.C. p. 79.

⁶ *Graham v. Peat* (1801) 1 East 244, 6 R.R. 268, *Supra* p. 165.

⁷ *Armory v. Delamirie* (1721) 1 Str. 504.

¹ 15 & 16 Vict. c. 76. s. 214.

² Chitty's Pleading, I., p. 210, 7th ed. It is true, indeed, that in the action of ejectment under the old practice, damages were recoverable as well as the land itself; but these damages were in general

3. The action for mesne profits was a particular form of the action of trespass *quare clausum fregit*; its proper title was the action of trespass for mesne profits. Whether the dispossession had or had not been effected by way of trespass, the claim for mesne profits was always in form a claim for damages for a continuing trespass upon the land.³ Such a claim was based upon and rendered possible by the doctrine of trespass by relation which has been already explained in the chapter on Trespass.⁴ To remain wrongfully in possession of land is not, as we have already seen, in itself a trespass, even although the act of first entering upon the land was a trespass. But after the plaintiff so kept out of possession has re-entered and recovered his possession, he is remitted by a legal fiction to his former status *ab initio*, and is deemed never to have been out of possession. It then becomes possible for him, therefore, to sue in trespass for all acts that have been done upon the land during the period of his dispossession—including the continued dispossession itself. Hence the action for mesne profits. "That is the ordinary doctrine on which actions for mesne profits are founded; you look to the date of the title, and after entry consider the party entitled to have been then in possession."⁵ "The general doctrine is that where a man is disseised and re-enters, such re-entry refers to and has relation back to the time of his first entry, and he may bring an action of mesne profits and recover them from the date of the prior entry."⁶

4. Since the action for mesne profits was thus founded on the doctrine of trespass by relation, it followed that the action would not lie until after the plaintiff had re-entered and merely nominal, being given only in respect of the trespass, if any, committed by the defendant in turning the plaintiff out of possession, and not in respect of the loss sustained by him through being kept out of possession. This had to be sued for separately in an action for mesne profits.

³ Chitty's Precedents in Pleading, 661: "That the defendant broke and entered messuages of the plaintiff situate etc., and ejected the plaintiff from his possession and occupation thereof and kept him so ejected for a long time and during that time took and received to the use of him the defendant all the issues and profits of the said tenements, etc."

⁴ *Supra*, p. 165.

⁵ *Radcliffe v. Anderson* (1858) E.B. & E. p. 824.

⁶ *Litchfield v. Ready* (1850) 5 Ex. p. 944. See also Co. Litt. 257 a.

recovered the possession of the land. This re-entry might be by his own act, or it might be by way of judgment in ejectment and execution issued thereon. But one mode or the other was an essential condition precedent to the action. The only exception to this rule seems to have been the case where a re-entry had become impossible owing to the determination of the plaintiff's title to the land. If for example a leaseholder was ejected and kept out of possession for the residue of the term, he could without entry recover damages for his term.⁷

5. This requirement of re-entry as a condition precedent to an action for mesne profits is now abolished to this extent, that a claim for such profits may in all cases be joined with an action of ejectment; for this is expressly allowed in the case of landlord and tenant by the Common Law Procedure Act, 1852, sec. 214, and impliedly in all other cases by the Rules of the Supreme Court, O. 18, r. 2.⁸ This, however, leaves open the question whether an action for mesne profits will now lie without an action of ejectment and before the recovery of the land. It seems clear that it will not, and that the prohibition of such a proceeding was not a mere technicality of the old procedure, but is a subsisting rule of substantive law. To hold otherwise would enable a person dispossessed of land to sue in repeated actions *de die in diem* for damages for being kept out of possession, just as he might sue for a continuing trespass or nuisance; whereas his true remedy is to recover the land itself, together with damages once for all in respect of the completed period of his dispossession.

The law, then, seems to be as follows: A person dispossessed of land may

- (a) Sue in ejectment and for mesne profits in one action;
- (b) Sue for mesne profits, if he has already got back into possession either by means of an action of ejectment or otherwise;
- (c) Sue for mesne profits without ejectment and without recovery of possession, if his interest in the land has already come to an end.

⁷ 2 Rolle's Abridg. 550. ⁸ *Dunlop v. Macedo* (1891) 8 T.L.R. 43.

6. In an action for mesne profits (notwithstanding the name of the action) the plaintiff is not limited to a claim for the profits which the defendant has received from the land, or those which he himself has lost. He recovers all the loss which has resulted from the dispossession.⁹

7. When the land has during the period of the plaintiff's dispossession been in the possession of two or more successive wrongdoers, an action for mesne profits will lie against each of them in respect of the period of his own possession. "For by the re-entry of the disseisee he is remitted to his first possession, and as if he had never been out of possession; and then all who occupied in the meantime, by what title soever they come in, shall answer unto him for their time."¹⁰ A lessor is responsible in an action for mesne profits for the period of his tenant's possession as well as for his own.¹¹

8. It seems not to have been decided whether a defendant in an action for mesne profits can set off the value of improvements made by him to the property in good faith during the period of his possession.¹² Since, however, the plaintiff's claim is for the loss suffered by him in consequence of the dispossession, it would seem clear on principle that he must take into account the value to himself of the improvements made by the defendant. If the defendant has pulled down an old house and built a new one, it can scarcely be supposed that the plaintiff can recover both the new house in an action of ejectment and the value of the old one in an action for mesne profits.

Claims
against
successive
occupiers.

Right to set
off value of
improvements.

⁹ *Goodtitle v. Tombs* (1770) 3 Wils. p. 121; *Dunn v. Large* (1783) 3 Doug. 335.

¹⁰ *Halcomb v. Rawlyns*, Cro. Eliz. 540. See, however, *Liford's case* 11 Rep. 51a.

¹¹ *Doe v. Harlow* (1840) 12 A. & E. 40; 54 R.R. 523. A tenant who sublets is liable for mesne profits to his lessor if the sub-tenant holds over after the termination of the original lease. *Henderson v. Squire* (1869) L.R. 4 Q.B. 170.

¹² See *Mayne on Damages*, p. 476, 7th. ed.

CHAPTER VII.

NUISANCE.

§ 59.—The Nature of Nuisance.

Public
and private
nuisances.

1. It is usual to divide nuisances into two kinds, distinguished as public and private. A private nuisance is a kind of civil wrong, the nature of which we are about to consider. A public or common nuisance is a species of criminal offence, which has been defined as¹ "an act not warranted by law, or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects." Examples of a public nuisance are keeping a common gaming house or a disorderly inn, publicly selling unwholesome provisions, obstructing a highway, or making it dangerous for traffic.

Public and private nuisances are not in reality two species of the same genus at all. There is no generic conception which includes the crime of keeping a common gaming house and the tort of allowing one's trees to overhang the land of a neighbour.

We are here concerned solely with private nuisances. Public nuisances do not fall within the law of torts at all, except in so far as such a nuisance may in the particular case constitute some form of tort also. Thus the obstruction of a highway is a public nuisance; but if it causes any special and peculiar damage to an individual, it is also a tort actionable at his suit.²

Two kinds of
private
nuisances.

2. Private nuisances are themselves of two kinds, *viz.*, (a) any wrongful disturbance of an easement or other servitude appurtenant to land, and (b) the act of wrongfully causing

¹ Stephen's Digest of Criminal Law, Art. 197, 6th ed.

² *Infra*, § 92.

or allowing the escape of deleterious things into another person's land (*e.g.*, smoke, smells, fumes, noise, electricity, water, or noxious vegetation). Here again it does not seem possible to include these two kinds of nuisances within any single definition. They are not in reality two species of the same generic injury, but two different injuries which happen to be called by the same name. In the present chapter we are concerned solely with the second of these kinds, and to it alone we shall apply and confine the term nuisance. The disturbance of servitudes will be treated in a later chapter, and will be spoken of under that designation and not under that of nuisance.³

3. The wrong of nuisance, as distinguished from the disturbance of servitudes, consists in the act of the defendant in causing or allowing without lawful justification (but not so as to amount to a trespass) the escape of any deleterious thing from his land or from elsewhere into land in the possession of the plaintiff: for example, water, smoke, smell, fumes, gas, noise, heat, vibrations, electricity, disease-germs, animals, and vegetation.⁴

³ The explanation of this threefold meaning and application of the term nuisance is that in its origin the term was merely a generic expression meaning wrongful harm, and that although it has now lost this wide signification, it has failed to attain instead any single specific application. The term is derived, through the French, from the late Latin *nocentia*: see Tertull. Apol. cap. 40—*Deus innocentiae magister nocentiae iudex*. Chaucer used it in this generic sense: "Helpe me for to weye ageyne the feende . . . Keepe us from his nusanee." (Mother of God, I. 21.) Nuisance appears in the old Latin pleadings as *nocumentum*, *i.e.*, harm. The terms trespass and tort, though similarly generic in their original use, have been more successful in the process of specification.

⁴ The following cases illustrate the different kinds of nuisances:—

SMELL:—*Rapier v. London Tramways Co.* (1893) 2 Ch. 588 (stables).

NOISE:—*Christie v. Davey* (1893) 1 Ch. 316 (music to annoyance of neighbours); *Broder v. Saillard* (1876) 2 Ch.D. 692 (stable adjoining dwelling house); *Ball v. Ray* (1873) L.R. 8 Ch. 467 (the same); *Sturges v. Bridgman* (1879) 11 Ch.D. 852 (machinery); *Rushmer v. Polsue & Alfieri Ltd.* (1906) 1 Ch. 234 (machinery).

DISEASE GERMS:—*Metropolitan Asylum District v. Hill* (1882) 47 L.T. 29; *Att.-Gen. v. Corporation of Nottingham* (1904) 1 Ch. 673.

HEAT:—*Reinhardt v. Mentasti* (1889) 42 Ch.D. 685 (cooking stove a nuisance to adjoining wine cellar); *Robinson v. Kilvert* (1889) 41 Ch.D. 88.

Nuisance
commonly a
continuing
injury.

4. Nuisance is commonly a continuing wrong ; that is to say, it commonly consists in the establishment or maintenance of some state of things which continuously or repeatedly causes the escape of noxious things on to the plaintiff's land : *e.g.*, a stream of foul water, or the constant noise or smell of a factory. An escape of something on a single occasion, however harmful and wrongful, (*e.g.*, the escape of water from the bursting of a reservoir) would not in common speech be termed a nuisance. This distinction, however, is not one which admits or requires any legal recognition for the purposes of the law of nuisance. All wrongful escapes of deleterious things, whether continuous, intermittent, or isolated, are equally to be classed as nuisances in law ; for they are all governed by the same principles.⁵

Nuisance
commonly on
defendant's
land.

5. A nuisance is commonly created by acts done on land in the occupation of the defendant, adjoining or in the neighbourhood of that of the plaintiff, and the law of nuisance is

FUMES :—*St. Helens Smelting Co. v. Tipping* (1865) 11 H.L.C. 642 (fumes of copper smelting injurious to trees and crops) ; *Crumph v. Lambert* (1867) L.R. 3 Eq. 409 (effluvia of factory chimney) ; *Sablin v. North Brancepath Coal Co.* (1874) L.R. 9 Ch. 705 (fumes from coke ovens injurious to trees and crops).

WATER :—*Broder v. Saillard* (1876) 2 Ch.D. 692 (moisture from artificial mound of earth on defendant's land injurious to adjoining house) ; *Hurdman v. N.E. Rly. Co.* (1878) 3 C.P.D. 168 ; *Snow v. Whitehead* (1884) 27 Ch.D. 588.

ELECTRICITY :—*Eastern & South African Telegraph Co. v. Cape Town Tramways Companies* (1902) A.C. 381 (escape of electricity from electric tramways preventing working of electric telegraph) ; *National Telephone Co. v. Baker* (1893) 2 Ch. 186.

POLLUTION OF WATER :—*Ballard v. Tomlinson* (1885) 29 Ch.D. 115 (plaintiff's well polluted with defendant's sewage) ; *Crossley v. Lightowler* (1867) 2 Ch. 478 (stream polluted by dye works) ; *Harrington (Earl) v. Corporation of Derby* (1905) 1 Ch. 205 (river polluted with sewage).

VIBRATIONS :—*Shelfer v. City of London Electric Lighting Co.* (1895) 1 Ch. 287 (steam engines causing discomfort to residents in adjoining house and structural damage to house).

VEGETATION :—*Smith v. Giddy* (1904) 2 K.B. 448 (trees spreading branches beyond boundary) ; *Crowthurst v. Burial Board of Amersham* (1878) 4 Ex. D. 5 (the same).

ANIMALS :—*O'Gorman v. O'Gorman* (1903) 2 Ir.R. 573 (bees).

⁵ The difference in question is not one that admits of being so defined as to serve as the basis of any legal distinction, for it is in reality nothing more than an indeterminable difference in degree. If we were to

consequently for the most part an application of the maxim *Sic utere tuo ut alienum non laedas*. It marks the limit set to the use of land, in order to prevent harm to the land of others. Yet this is not invariably the case. A nuisance may be created not on the land of the defendant, but elsewhere : e.g., on a highway adjoining the plaintiff's land,⁶ or in a navigable river, or in some place of public resort. And even when it is on adjoining private land, the defendant need not be the owner or occupier of that land ; he may, for example, be a contractor executing works there which cause a nuisance to adjoining property.⁷

6. The true relation between nuisance and trespass would seem to be that these wrongs are mutually exclusive, and not partially coincident. Nothing is to be rightly classed as a nuisance, if it is really a trespass. The chief importance of the distinction is that trespass is actionable *per se*, while nuisance is actionable only on proof of actual damage.⁸

Nuisance
and trespass
distinguish-
guished.

The test of the distinction is whether under the old practice a writ of trespass would have been available, or only a writ of case ; and this, as we have seen in a former chapter, depends on whether the injury is or is not a direct act of physical interference with the plaintiff's land. Directly to cause a material and tangible object to enter another person's land is a trespass and no nuisance ; but where the thing is not material and tangible (such as electricity, noise, smell, or smoke) or where, though material and tangible, its entry is not the direct act of the defendant, but merely consequential on his act, the injury is not a trespass, but merely a nuisance actionable on proof of actual damage. To plant a tree in another man's land is a trespass ; but to allow it to spread its

define a nuisance as the continuing escape of deleterious things, how long would this continuance have to last in order to constitute a nuisance rather than some other kind of wrong ? The stream of water that escapes from a bursting reservoir is continuing for a certain time, and it is governed by the same rules of liability, however long or short a time it lasts. In *Midwood v. Mayor of Manchester* (1905) 2 K.B. 597 damage done to the plaintiff's premises by an explosion of gas in the adjoining highway was held to be caused by a nuisance within the meaning of that term as used in an act of Parliament.

⁶ *Benjamin v. Storr* (1874) L.R. 9 C.P. 400.

⁷ *Thompson v. Gibson* (1841) 7 M. & W. 456 ; 56 R.R. 762.

⁸ *Supra* p. 159. *Infra* p. 184.

roots and branches across the boundary is a nuisance and not a trespass.⁹ To throw water upon another's premises is a trespass; to allow or cause water to flow there by natural gravitation is, if actionable at all, a nuisance and no trespass.^{10 11 12}

§ 60.—Damage Caused by Nuisance.

No nuisance
without
damage.

1. No action will lie for a nuisance unless it is the cause of actual damage to the plaintiff. No man is bound to prevent the escape from his land of things which do no harm. Thus no action will lie against him who allows the branches of his trees to overhang his neighbour's land, or their roots to grow into his neighbour's soil, unless actual damage is thereby caused.¹ The adjoining occupier must protect himself against such an invasion by cutting the branches or roots which project beyond the boundary; and this he may do, even though they are doing him no harm.² Similarly it is to be presumed that no action will lie against me because my dog or my cat goes upon the plaintiff's land, unless they there cause some mischief or inconvenience. A trespass, on the contrary, is actionable *per se*.³

2. The damage that is sufficient to found an action of nuisance may consist either in (1) some physical injury to the premises occupied by the plaintiff, or to the property of the plaintiff situated thereon, or (2) some interference with the beneficial use of these premises. Any substantial interference with the comfort or convenience of persons occupying or

⁹ *Lemmon v. Webb* (1894) 3 Ch. p. 11; *Smith v. Giddy* (1904) 2 K.B. 448.

¹⁰ *Reynolds v. Clarke* (1725) 2 Ld. Raym. 1399.

¹¹ As to the anomalous case of the so called trespasses of cattle, see *supra*, p. 161, n. 13.

¹² It is true, indeed, that in the old practice the remedies of trespass and case were in certain instances concurrent, the plaintiff having an option to sue in either form of action; and in this sense and to this extent it may be said that trespass and nuisance were coincident and overlapping species of injuries. As already indicated, however, (*ante*, p. 158, n.) these cases of concurrence between trespass and case were anomalous and illogical. They may and indeed must be disregarded in any attempt at logical classification and definition in modern law.

¹ *Smith v. Giddy* (1904) 2 K.B. 448.

² *Lemmon v. Webb* (1905) A.C. 1.

³ *Supra*, p. 159.

using the premises is a sufficient interference with the beneficial use of them within the meaning of this rule.

3. When an action of nuisance is based on mere discomfort or inconvenience, this discomfort or inconvenience must be substantial. That is to say, it must not be merely trifling or fanciful or such as an average and reasonable man is content to submit to. Sensible men living with their fellows are content to bear with patience many minor inconveniences, which do not substantially interfere with the ordinary comfort of human existence; and by law all men, whether sensible or not, are bound to submit to annoyances of this kind. *De minimis non curat lex*. The rule is well expressed by Knight Bruce, V.C., in *Walter v. Selfe*:⁴ "Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?"⁵

Nuisance causing discomfort.

4. The standard of comfortable living which is thus to be taken as the test of a nuisance is not a single universal standard for all times and places, but a variable standard differing in different localities. The question in every case is not whether the individual plaintiff suffers what he regards as substantial discomfort or inconvenience, but whether the average man who resides in that locality would take the same view of the matter. The law of nuisance does not guarantee for any man a higher immunity from discomfort or inconvenience than that which prevails generally in the locality in which he lives. He who dislikes the noise of traffic must not set up his abode in the heart of a great city. He who loves peace and quiet must not live in a locality devoted to the business of making boilers or steam ships. Thus in *Sturges v. Bridgman*⁶ Thesiger, L.J., says: "Whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances:

The standard of comfort.

⁴ (1851) 4 De. G. & Sm. p. 322.

⁵ For instances in which the discomfort alleged was too trivial to amount to nuisance, see *Christie v. Davey* (1893) 1 Ch. 316; *Gaunt v. Fynney* (1872) L.R. 8 Ch. 8.

⁶ (1879) 11 C.D. p. 865.

what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong." In *Rushmer v. Polsue & Alfieri*⁷ this doctrine of the local standard of comfort was definitely accepted by the Court of Appeal. "The standard of comfort," says Cozens-Hardy, L.J., "differs according to the situation of the property and the class of people who inhabit it. . . But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to create a legal nuisance." ⁸ ⁹

Temporary nuisance.

5. The temporary nature of the inconvenience or discomfort is a fact to be taken into account in judging whether it is sufficiently substantial to amount to a nuisance.¹⁰ But if it is otherwise substantial, it is none the less a nuisance because it is merely temporary.¹¹

Malicious nuisance.

6. It seems that if discomfort or inconvenience is inflicted intentionally and wantonly without any reasonable cause, the requirement of substantiality does not exist. The duty to submit to the minor inconveniences of life is imposed only for the sake of the reasonable activities of other persons, and does not justify wanton or malicious attacks upon one's comfort. On this principle North, J., in *Christie v. Davey*¹² granted an injunction against piano playing and other noises which were maliciously intended to cause discomfort to the

⁷ (1906) 1 Ch. 234.

⁸ *Ibid.* at p. 250.

⁹ See also *St. Helens Smelting Co. v. Tipping* (1865) 11 H.L.C. *per* Lord Westbury at p. 650, and *per* Lord Cranworth at p. 653. Also *Colls v. Home and Colonial Stores* (1904) A.C. at p. 185, *per* Lord Halsbury. The lowering of the standard of comfort in particular localities does not depend on the existence of prescriptive rights to create nuisances there. *Rushmer v. Polsue & Alfieri* (1906) 1 Ch., at p. 251, *per* Cozens-Hardy, L.J.

¹⁰ *Harrison v. Southwark Water Co.* (1891) 2 Ch. 409.

¹¹ *Fritz v. Hobson* (1880) 14 C.D. p. 556; *Bamford v. Turnley* (1860) 3 B. & S. p. 84.

¹² (1893) 1 Ch. 316.

occupier of the adjoining house, although, had they been made for a legitimate purpose, the discomfort would not have been sufficiently substantial to be actionable. So also in *Harrison v. Southwark Water Co.*¹³ Vaughan Williams, L.J., says: "The law in judging what constitutes a nuisance does take into consideration both the object and duration of that which is said to constitute the nuisance."

7. The damage complained of in an action of nuisance must be actual and not merely prospective. If the defendant's operations do not now cause harm, discomfort, or inconvenience, they do not constitute a nuisance, even though they would certainly produce such effects were the plaintiff to have occasion in the future to use his land in some other way. Thus a noisy or offensive factory is not a nuisance actionable at the suit of the owner of an unoccupied piece of building land adjoining it. It does not become a nuisance until the plaintiff actually builds a dwellinghouse or other building on his land and the prospective discomfort becomes a present reality.¹⁴

8. No action will lie for a nuisance in respect of damage which, even though substantial, is due solely to the fact that the plaintiff is abnormally sensitive to deleterious influences, or uses his land for some purpose which requires exceptional freedom from any such influences. Every person is entitled to do on his own land anything that does not interfere with other persons in the ordinary enjoyment of life or the ordinary modes of using property. In other words, his neighbours have a right to the ordinary conditions of comfortable existence, and to the ordinary conditions of the beneficial use of property; but they have a right to nothing more. Extraordinary and special requirements are not protected by the law of nuisance. If a man is morbidly sensitive to noise, so that he is prevented from working or sleeping by noises which would not annoy other people, this is indeed substantial damage inflicted upon him, but is not actionable as a nuisance. Similarly the law of nuisance does not guarantee to a sick man any further exemption from the noise of traffic in the street, than it guarantees to him who is well.

¹³ (1891) 2 Ch. p. 414.

¹⁴ *Sturges v. Bridgman* (1879) 11 Ch.D. 852.

So if I carry on a manufacture or other business which is so sensitive to adverse influences that it suffers damage from smoke, fumes, vibrations, or heat, which would in no way interfere with the ordinary occupation of land, the law of nuisance will not confer upon me any such special and extraordinary protection. I must acquire immunity from damage of this sort by special contract with my neighbours. Thus in *Eastern & South African Telegraph Co. v. Cape Town Tramways Co.*¹⁵ an action was brought by the telegraph company for interference with its telegraphic operations through induced currents caused by the working of the defendants' electric cars. The Privy Council held the defendants not liable on the ground that such a cause would do no harm to the ordinary occupation of land, and that the damage done was solely due to the exceptionally delicate nature of the operations conducted by the plaintiffs. "A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure."¹⁶ The same principle was acted on by the Court of Appeal in *Robinson v. Kilvert*,¹⁷ where the nuisance complained of was one of heat, causing damage to the exceptionally delicate manufacture of the plaintiff.

In its application to those nuisances which consist in interference with health or comfort this rule is easy of application; the requirements of the average man form a definite standard and test of the rights of the plaintiff. The application of the same rule to nuisances of other kinds, however, is likely to prove a matter of some difficulty. By what test are we to distinguish between ordinary and exceptional requirements for the beneficial occupation of land?

§ 61.—Ineffectual Defences.

Coming to the nuisance.

1. It is now settled that it is no defence that the plaintiff himself came to the nuisance. It was, indeed, at one time supposed that no one could complain of a nuisance, if with full knowledge of its existence he chose to become the owner or occupier of the land affected by it: as if he knowingly took

¹⁵ (1902) A.C. 381.

¹⁶ *Ibid.*, p. 393.

¹⁷ (1889) 41 Ch.D. 88. Cf., however, *Cooke v. Forbes* (1867) L.R. 5 Eq. 166.

a house close to a noisy factory. This, however, is not the law. The maxim *Volenti non fit injuria* is capable of no such application.¹

2. It is no defence that the nuisance, although injurious to the individual plaintiff, is beneficial to the public at large. A nuisance may be the inevitable result of some manufacture or other operation that is of undoubted public benefit—a benefit that far outweighs the loss inflicted upon the individual—but it is an actionable nuisance none the less. No consideration of public utility can be suffered to deprive an individual of his legal rights without compensation.² Public benefit.

3. Nor is it any defence that the place from which the nuisance proceeds is a suitable one for the purpose of carrying on the operation complained of, and that no other place is available in which less mischief would result. If no place can be found where such a business will not cause a nuisance, then it cannot be carried on at all, except with the agreement of adjoining proprietors or the sanction of an act of parliament.³ This rule, however, is to be read in the light of the principle already considered by us⁴ to the effect that the test of nuisance is the actual local standard of comfort, and not an ideal and general standard. Suitable place.

4. In the case of continuing nuisances it is no defence that all possible care and skill is being used to prevent the operation complained of from amounting to a nuisance. "At common law," says Lindley, L.J.,⁵ "if I am sued for a nuisance and the nuisance is proved, it is no defence on my part to say and to prove that I have taken all reasonable care to prevent it." If an operation cannot by any care and skill be prevented from causing a nuisance, it cannot lawfully be undertaken at all, except with the consent of those injured by it, or the authority of a statute. Thus it is an actionable nuisance at common law Care and skill.

¹ *Elliotson v. Feetham* (1835) 2 Bing. N.C. 134, 42 R.R. 557; *Bliss v. Hall* (1838) 4 Bing. N.C. 183, 44 R.R. 697.

² See for example *Shelfer v. City of London Electric Lighting Co.* (1895) 1 Ch. p. 316, and *supra*, p. 124.

³ *St. Helens Smelting Co. v. Tipping* (1865) 11 H.L.C. 642; *Bamford v. Turnley* (1860) 3 B. & S. 62, overruling *Hole v. Barlow* (1858) 4 C.B. (N.S.) 334.

⁴ *Supra*, p. 185.

⁵ *Rapier v. London Tramways Co.* (1893) 2 Ch. p. 599.

to run a locomotive engine which cannot by any skill in construction or care in management be prevented from discharging sparks; and in the absence of statutory authority he who does so is liable for the consequences, however careful he may have been to prevent them.⁶

It will be understood that these remarks apply solely to nuisances caused by some continuing operation which has been shown by experience to be a necessary source of mischief. How far damage done accidentally, in the course of an operation which is not thus known to be a necessary source of danger, is any ground of liability in the absence of negligence is a question which will be considered later.

Contributory
acts of
others.

5. It is no defence that the act of the defendant would not amount to a nuisance unless other persons acting independently of him did the same thing at the same time.⁷ Thus if twenty factories pour out smoke and fumes into the atmosphere, the contribution of each may be so small and its detrimental effect so inappreciable, that it does not *per se* amount to a nuisance. Yet the aggregate quantity may be the cause of serious harm or discomfort. In such a case each of the contributors is liable for a nuisance and for his own proportion of the total damage.

Reasonable
use of
property.

6. He who causes a nuisance cannot avail himself of the defence that he is merely making a reasonable use of his own property. No use of property is reasonable which causes substantial discomfort to other persons, or is a source of damage to their property.⁸

§ 62.—The Rule in *Rylands v. Fletcher*.

Liability for
escape of
dangerous
things
is absolute.

1. The rule known as that in *Rylands v. Fletcher*¹ is one of the most important cases of absolute liability recognised by

⁶ *Jones v. Festiniog Rly. Co.* (1868) L.R. 3 Q.B. 733; *Powell v. Fall* (1880) 5 Q.B.D. 597.

⁷ *Lambton v. Mellish* (1894) 3 Ch. 163. Cf. *Sadler v. Gl. W. Rly. Co.* (1896) A.C. 450. There is no joint liability in such cases; each is severally liable for his own act.

⁸ *Bamford v. Turnley* (1862) 3 B. & S. 66; *Reinhardt v. Mentasti* (1889) 42 Ch.D. 685; *Att.-Gen. v. Cole* (1901) 1 Ch. 205; *Broder v. Saillard* (1876) 2 Ch.D. p. 701, *per* Jessel, M.R.; *Scott v. Firth* (1865) 4 F. & F. p. 351, *per* Blackburn, J. See, however, the observations of Buckley, J., in *Sanders-Clark v. Grosvenor Mansions Co.* (1900) 2 Ch. 373.

our law—one of the chief instances in which a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence. The rule may be formulated thus :—

The occupier of land, who brings or keeps upon it anything likely to do damage if it escapes, is bound at his peril to prevent its escape, and is liable for all the natural and probable consequences of its escape, even if he has been guilty of no negligence.

The occupier of land is liable not merely for *causing* the escape of deleterious things from his land into that of his neighbours, but also for *failing to prevent* such an escape. He owes not merely a negative duty to refrain from active injury, but also a positive duty to guard and protect his neighbours, lest they suffer harm by reason of dangers present on his land. Moreover this duty is an absolute one, liability for the breach of it being independent of any negligence on the part of the defendant or his servants. Subject to the exceptions hereinafter mentioned, he who keeps on his land things capable of being a source of mischief does so *suo periculo*, and must pay for any nuisance created by them, however careful he may have been to prevent it. He is the insurer of his neighbours against all harm so resulting.

2. In *Rylands v. Fletcher*² the defendants constructed a reservoir upon their land, and upon the site chosen for this purpose there was a disused and filled up shaft of an old coal mine, the passages of which communicated with the adjoining mine of the plaintiff. Through the negligence of the contractors or engineers engaged by the defendants this fact was not discovered, and the danger caused by it was not guarded against. When the reservoir was filled, the water escaped down the shaft and thence into the plaintiff's mine, which it flooded. It was held by the Exchequer Chamber and by the House of Lords that the defendants were liable, although guilty of no negligence either by themselves or by their servants. Lord Cranworth says :³ " If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and

Rylands v. Fletcher.

¹ (1866) L.R. 1 Ex. 265 ; (1868) L.R. 3 H.L. 330.

² *Ibid.*

³ L.R. 3 H.L. p. 340.

causes damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." So in the judgment of the Exchequer Chamber it is said :⁴ " The question of law therefore arises, what is the obligation which the law casts on a person, who like the defendants, lawfully brings on his land something which, though harmless while it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours ; but the question arises whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more. . . We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

Black v.
Christchurch
Finance Co.

3. Similarly in *Black v. Christchurch Finance Co.*⁵ the defendants were the occupiers of certain land in New Zealand, which they desired to clear of scrub by burning. For this work they engaged an independent contractor, and gave him specific instructions that he was not to burn the scrub during the hot and dry month of February. In breach of his instructions he wrongfully and negligently burned it in that month, and a high wind carried the fire into the adjoining land of the plaintiff, where it did extensive damage. The defendants, though free from all personal negligence, were held liable by the Privy Council.

Humphries
v. Cousins.

4. In *Humphries v. Cousins*⁶ the plaintiff and defendant were the occupiers of two adjoining houses. An old drain, which commenced on the defendant's premises, and thence passed under and received the drainage of several other houses, turned back again under the defendant's house, and thence under the cellar of the plaintiff's house. That part of the

⁴ L.R. 1 Ex. p. 279.

⁵ (1894) A.C. 48.

⁶ (1877) 2 C.P.D. 239.

return drain which was under the defendant's premises became decayed, and the sewage escaped into the plaintiff's cellar. The defendant was unaware of the existence of the return drain, and it was held nevertheless by the Court of Appeal that he was responsible for the damage thus suffered by the plaintiff.

5. Similarly in *Ellis v. Loftus Iron Co.*⁷ it was held that the same rule of absolute liability extended to damage done by the trespasses of cattle. Ellis v. Loftus Iron Co.

6. It will be noticed that the rule in *Rylands v. Fletcher* is applicable only to the *occupier* of the land from which the nuisance proceeds. How far, if at all, liability for nuisance is imposed by law on the owners of land, or on any other persons than the occupier, is a question which must be here postponed and will be considered at a later stage. Liability on occupier only.

7. Although the rule in *Rylands v. Fletcher* makes the defendant liable for an escape apart from any negligence, it does not make him liable for all the consequences of the escape. His liability is limited by the ordinary rule as to remoteness of damage. That is to say, he is responsible only for the sort of harm which the thing kept by him is likely to do if it does escape. He keeps it at his peril, only so far the natural and probable consequences of its escape are concerned.⁸ Remoteness of damage.

8. There are several dicta to the effect that the rule in *Rylands v. Fletcher* does not apply to what is termed the *natural* user of land, but applies only when the defendant has put his land to some non-natural or extraordinary purpose. There is no decided case, however, which rests upon the acceptance of any such distinction, and it has nothing in principle to recommend it. What is the natural use of land? Is it natural to build a house on it, or to light a fire? Almost all use of land involves some alteration of its natural condition, and it seems impossible to say how far this alteration may go, before the use of the land becomes non-natural or extraordinary, so as to bring the rule in *Rylands v. Fletcher* into operation. Moreover if there is one kind of use more natural than another, it is the keeping of cattle; yet cattle trespass Alleged distinction between natural and non-natural use of land.

⁷ (1874) L.R. 10 C.P. 10.

⁸ *Fletcher v. Rylands*, L.R. 1 Ex. p. 279.

is a typical instance of the application of this rule of strict responsibility, and is indeed the historical source of the general principle.⁹

Exceptions.

9. The rule in *Rylands v. Fletcher* is subject to a number of important exceptions, there being particular classes of cases in which the occupier is either not liable at all, or not liable in the absence of negligence. These exceptions are considered in the succeeding sections.

§ 63.—First Exception: Things Naturally on Land.

No liability for things naturally on defendant's land.

1. The rule in *Rylands v. Fletcher* applies to things which are artificially brought or kept upon the defendant's land, and is inapplicable to things which are naturally there, howsoever dangerous they may be: *e.g.*, noxious weeds, vermin, or water. So far from being absolutely liable for the escape of these things, the occupier of land is not even under any duty of care to prevent their escape. From such dangers every man must protect himself. Thus in *Giles v. Walker*¹ it was held that the occupier of land is not bound to prevent the growth of thistles on it and the consequent spread of thistle-down to the lands of his neighbours. On the same principle an occupier is not bound to prevent damage to his neighbour by the natural escape of flood water from higher to lower levels.² Nor is he liable for the overflow of a stream on his land caused by the growth of weeds or the deposit of silt in the bed of it.³

⁹ For examples of the dicta here considered, see *Blake v. Woolf* (1898) 2 Q.B. at p. 428; *Gill v. Edouin* (1894) 71 L.T. p. 763; *Att.-Gen. v. Tomline* (1879) 12 Ch.D. p. 229; *Eastern & S.A. Telegraph Co. v. Cape Town Tramways Co.* (1902) A.C. p. 393. The origin of this alleged distinction between natural and non-natural user is to be found in certain observations of Lord Cairns in *Rylands v. Fletcher*, L.R. 3 H.L. at p. 338; but it seems clear that these observations were made with reference to the particular case of the percolation of water naturally present on the defendant's land, as opposed to the escape of water artificially brought upon that land. His illustration of the distinction is the case of *Smith v. Kenrick* (1849) 7 C.B. 515, in which the flow of water by gravitation into the plaintiff's mine, though caused by the mining operations of the defendant, was held to give no cause of action. As to this, see *infra*, p. 196.

¹ (1890) 24 Q.B.D. 656.

² *Nield v. London & N.W. Rly. Co.* (1874) L.R. 10 Ex. 4.

³ *Hodgson v. Mayor of York* (1873) 28 L.T. 836.

Similarly there is no liability for the escape of noxious animals naturally on the defendant's land, such as rats, rabbits, or birds.⁴

2. A person is liable, however, even for the escape of things naturally on his land, if he has artificially accumulated them there so that their escape does more mischief than it would otherwise have done. If he collects in a reservoir the rain water that falls upon his land, he is no less responsible for its escape than if he had brought the water in pipes from elsewhere. So if, for the purpose of sport or otherwise, he purposely accumulates rabbits or game upon his land, he is probably liable for all damage done by them to neighbouring proprietors. "I will first deal," says Pollock, B., in *Farrer v. Nelson*,⁵ "with the question whether an action can be brought by a neighbour against any person who collects animals upon his land so as to injure the crops of the neighbour, and I should say that beyond doubt such an action would lie."⁶

3. Although a person is not liable for allowing the escape of things naturally on his land, he is liable for causing their escape. Thus in *Whalley v. Lancashire & Yorkshire Rly. Co.*⁷ a railway embankment caused an accumulation of flood water, and in order to get rid of the water the railway company pierced the embankment and so caused the water to escape with destructive violence into the adjoining land of the plaintiff; and it was held that the company was liable for the damage so done.⁸ On the same principle a person is responsible for the escape of water from his land if it is due to some

⁴ *Brady v. Warren* (1900) 2 Ir. R. 632.

⁵ (1885) 15 Q.B.D. p. 260.

⁶ It is true, indeed, that in the old case of *Bowlston v. Hardy* (1597) Cro. Eliz. 547, it was decided that the making of coney burrows and the keeping of coneys therein which ate the crops on the adjoining land of the plaintiff was no cause of action. But the reason given for the decision is the very insufficient one that the defendant had no property in the coneys—that they were not *his*, and therefore that he was not answerable for them. Probably this case is no longer law. See *Brady v. Warren* (1900) 2 Ir. R. 632; *O'Gorman v. O'Gorman* (1903) 2 Ir. R. 573.

⁷ (1884) 13 Q.B.D. 131.

⁸ The act of preventing the entrance of flood water, on the other hand, is perfectly lawful, even though the known and necessary consequence is to cast that water upon the land of one's neighbour. *Nield v. London & N.W. Rly. Co.* (1874) L.R. 10 Ex. 4.

artificial structure made or maintained by him there, or to any other alteration of the natural condition of the land. Thus in *Hurdman v. North Eastern Railway Co.*⁹ the defendant was held liable for maintaining on his land an artificial mound of earth from which rain water percolated into the wall of the adjoining house of the plaintiff. "If anyone by artificial erection on his own land causes water, even though arising from natural rainfall only, to pass into his neighbour's land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is so injured."¹⁰

Liability of
mine-
owners.

Smith
v. Kenrick.

4. The general principle that a person is liable for causing the escape of water from his land into that of his neighbour is subject to an exception in the case of adjoining mineowners. The case of *Smith v. Kenrick*,¹¹ followed by *Baird v. Williamson*¹² and *Wilson v. Waddell*,¹³ has established the rule that no action will lie for the escape of water by natural gravitation into the plaintiff's mine, if this escape is caused merely by the working of the defendant's mine in the ordinary manner. "Each mineowner has all rights of property in his mine, and among them the right to get all minerals therefrom, provided he works with skill and in the usual manner. And if while the occupier of a higher mine exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature."¹⁴ It makes no difference that the damage complained of was the known and necessary result of the defendant's operations. The reason for the rule may be deemed to be this: that the plaintiff in such cases has brought the mischief on himself by altering the natural condition of his land. He must guard himself against the results of that alteration by leaving sufficient barriers against the percolation of water. He cannot by digging out the whole of his minerals impose an obligation upon his neighbour to refrain from doing the same.¹⁵

⁹ (1878) 3 C.P.D. 168.

¹⁰ *Ibid.*, p. 173, *per cur.* *Broder v. Saillard* (1876) 2 Ch.D. 692, is a similar decision.

¹¹ (1849) 7 C.B. 515; 78 R.R. 745.

¹² (1863) 15 C.B. N.S. 376.

¹³ (1876) 2 A.C. 95.

¹⁴ *Baird v. Williamson* (1863) 15 C.B. N.S. p. 391.

¹⁵ In several cases the exceptional rule in *Smith v. Kenrick* is distinguished from the general rule in *Rylands v. Fletcher* on the ground

The rule in *Smith v. Kenrick*¹⁶ applies only to the escape of water by natural gravitation in consequence of the ordinary mining operations of the defendant. A mineowner is liable if he purposely, and not merely as an ordinary incident of mining, discharges water from his own mine into that of the plaintiff.¹⁷

§ 64.—Second Exception: Consent of the Plaintiff.

The rule in *Rylands v. Fletcher* is not applicable to the escape of things brought or kept upon his premises by the defendant, not exclusively for his own purposes, but for the benefit and with the consent of the plaintiff. In such cases the defendant is not liable except for negligence. This principle finds its chief application in those cases in which the different storeys of a building are in the occupation of different persons, and the occupant of a lower storey complains of the damage done by the escape of water from an upper storey. Whether this water is rain water collected from the roof, or water supplied *ab extra* in pipes, it is settled law that there is no liability for any such escape in the absence of proved negligence on the part of the upper occupant.¹ For in such cases the water has been collected or brought there for the mutual benefit and with the express or implied consent of both parties; there is, therefore, no sufficient reason why the risk of accident should lie upon the upper, rather than upon the lower occupant, and the only duty is one of reasonable care. The same principle would doubtless apply to an escape of gas or any other deleterious substance which is there for the mutual

Consent of plaintiff a defence except in case of negligence.

that the former relates to the natural use of land and the latter to its non-natural or extraordinary use. *Hurdman v. N.E. Ry. Co.* (1878) 3 C.P.D. p. 174; *Whalley v. L. & Y. Ry. Co.* (1884) 13 Q.B.D. p. 140; *Rylands v. Fletcher*, L.R. 3 H.L. p. 338. This distinction, however, seems difficult of acceptance. It is not easy to see how the excavation of a coal mine is a natural use of land, and the excavation of a reservoir a non-natural use of it. See above p. 193.

¹⁶ (1849) 7 C.B. 515; 78 R.R. 745.

¹⁷ *Westminster Brymbo Coal & Coke Co. v. Clayton* (1866) 36 L.J. Ch. 476; *Baird v. Williamson* (1863) 15 C.B. N.S. 376.

¹ *Carstairs v. Taylor* (1871) L.R. 6 Ex. 217; *Ross v. Fodden* (1872) L.R. 7 Q.B. 661; *Anderson v. Oppenheimer* (1880) 5 Q.B.D. 602; *Blake v. Woolf* (1898) 2 Q.B. 426; *Gill v. Edouin* (1894) 71 L.T. 762, 72 L.T. 579.

benefit of the occupants. But except so far as this doctrine of mutual benefit extends, the rule in *Rylands v. Fletcher* is just as applicable between upper and lower occupiers, as between adjacent occupiers.

§ 65.—Third Exception : The Act of a Stranger.

No liability
for the act of
a stranger.

1. The rule in *Rylands v. Fletcher* is not applicable to damage done by the act of a stranger. Thus if a trespasser lights a fire on my land, I am not liable if it burns my neighbour's property.¹ So in *Box v. Jubb*² the defendants were held not responsible for damage done through an overflow from their reservoir, when that overflow was caused by the act of a third person who emptied his own reservoir into the stream which fed that of the defendant. Kelly, C.B., says :³ " The matters complained of took place through no default or breach of duty of the defendants, but were caused by a stranger over whom and at a spot where they had no control." So in *Wilson v. Newberry*⁴ a declaration that the plaintiff's horses were poisoned by eating certain clippings which had been cut from the defendant's yew trees and placed on the plaintiff's land, was held bad on demurrer, because it was not alleged how the cuttings got upon the land, and they might have been put there by a trespasser who had cut and removed them without the defendant's authority. So in *Nichols v. Marsland*⁵ Bramwell, B., says, speaking of the water in the defendant's reservoir : " Suppose a stranger let it loose, would the defendant be liable ? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier of the house would be liable. That cannot be."⁶

Who is a
stranger.

2. It does not clearly appear, however, who is to be deemed a stranger within the meaning of this rule. The term certainly includes a trespasser, and also any person who, without entering on the defendant's premises at all, wrongfully and without the defendant's authority causes the escape of dangerous

¹ *Black v. Christchurch Finance Co.* (1894) A.C. 48 ; *Beaulieu v. Finglam*, Y.B. 2 H. IV. f. 18. pl. 5.

² (1879) 4 Ex. D. 76.

³ At p. 79.

⁴ (1871) L.R. 7 Q.B. 31.

⁵ (1875) L.R. 10 Ex. p. 259.

⁶ See also *Gill v. Edouin* (1894) 71 L.T. p. 763.

things from those premises : as in the case of *Box v. Jubb*⁷ itself. It is equally clear that the term stranger does not include any person employed or authorised by the defendant to deal in any way with dangerous things on his land ; for the acts of such a person, even though he is an independent contractor, and even though he acts in excess or disregard of his authority, the occupier is vicariously liable.⁸ But what shall be said of persons lawfully upon the defendant's premises with his permission, but without authority to bring upon it, or to deal with, dangerous things : for example, the members of his family, his servants, his guests, or licensees permitted to use the land. It is submitted that for the acts of all such persons in bringing or keeping dangerous things on the premises, or in meddling with such things already on the premises, the occupier is vicariously liable under the rule in *Rylands v. Fletcher*.

3. Although an occupier is not absolutely and vicariously responsible for damage done by the act of a trespasser or other stranger, it may be that he is subject in certain cases to the lesser obligation of using reasonable care to prevent such damage. On this point, however, there seems to be no authority.

§ 66.—Fourth Exception : The Act of God.

1. The rule in *Rylands v. Fletcher* is not applicable to damage caused by the act of God or *vis major*.¹ The authority for this important limitation upon the rule of absolute liability is the decision of the Court of Exchequer Chamber in *Nichols v. Marsland*.² The defendant was in possession of certain artificial pools formed by damming a natural stream. The embankments and weirs were well and carefully constructed and were adequate for all ordinary occasions. A

No liability
for the act of
God.

Nichols
v. Marsland.

⁷ (1879) 4 Ex. D. 76.

⁸ *Black v. Christchurch Finance Co.* (1894) A.C. 48.

¹ The terms act of God and *vis major* are synonymous. The former corresponds to the *θεοῦ βία* of the Greeks and the *vis divina* of the Romans. (D. 19, 2, 25, 6. D. 39, 2, 24, 4.) Other equivalents are *damnum fatale* (D. 4, 9, 3, 1. D. 18, 6, 2, 1) *vis naturalis* (D. 19, 2, 59.) *vis major* (D. 4, 9, 3, 1.) and *casus major* (D. 44, 7, 1, 4).

² (1875) L.R. 10 Ex. 255.

very violent storm, however,—described by witnesses as the heaviest within human memory—broke down the embankments, and the rush of water down the stream carried away certain bridges, in respect of which damage the action was brought. It was held, notwithstanding *Rylands v. Fletcher*, that the defendant was not liable, inasmuch as there was no negligence on the part of any one, and the accident was due directly to the act of God. In the case of *Rylands v. Fletcher*, on the contrary, the accident was due to negligence on the part of the contractors by whom the reservoir was built, and for that negligence the owners of the reservoir were held vicariously liable.³

Act of
God defined.

2. It is necessary, therefore, to ascertain precisely what is meant by the term act of God, as used in this connection. On this point it is impossible, as the authorities stand, to come to any certain conclusion; but it is submitted that the term as here used means *any event which could not have been prevented by reasonable care on the part of any one*. This, indeed, is not, as we shall see later, the strict technical sense of the term as used in certain other departments of the law, and notably in the law as to the liability of common carriers. Nevertheless there seems good reason to conclude that in *Nichols v. Marsland* the phrase is used, not in its strictest and most technical sense, but in the wider and less specialised signification which has just been indicated.

Putting this interpretation on the rule in *Nichols v. Marsland*, the whole law as to the liability of the occupiers of land at once assumes a simple and rational form. No occupier is liable for any escape which is due to the act of a stranger or to the act of God: which means that he is not liable where there has been no negligence on the part of any one, or where the only negligence is that of a stranger (using that term in the sense already explained in the preceding section). In other words, the rule in *Rylands v. Fletcher* is a rule of vicarious liability, by virtue of which the occupier of land is responsible for the escape of dangerous things, if caused by the negligence

³ So in *Carstairs v. Taylor* (1871) L.R. 6 Ex. 217. in which the defendant was held not responsible for an escape of water from his cistern through a hole made in it by a rat, one of the grounds of the decision was that such an accident was a case of *vis major*.

of any person whatever except a mere stranger ; and we have already seen reason to conclude that no person is a stranger, within the meaning of this rule, who is lawfully on the premises with the permission of the occupier. For the negligence of all such persons, whether they are servants, independent contractors, members of his family, or licensees, the occupier is made responsible by *Rylands v. Fletcher*. When there is no negligence at all on the part of anyone, he is exempted from responsibility by *Nichols v. Marsland*. When the only negligence is that of a stranger, he is exempted from responsibility by *Box v. Jubb*.⁴

There are, it is believed, no decisions which are inconsistent with this interpretation of the rule as to the act of God, although it must be admitted that it has been often said or assumed that *Rylands v. Fletcher* imposes liability in cases in which there has been no negligence on the part of any one. It is submitted that these dicta are based on an unduly narrow view of the exception established by *Nichols v. Marsland*.

3. It may be, however, that the term act of God as used in *Nichols v. Marsland* is to be taken in its strictest sense, thereby confining the exception established by that decision to a narrower class of cases. It is necessary, therefore, to ascertain precisely what this strict signification is. The only adequate authorities on this point are the decisions on the liability of common carriers—the rule being that such carriers are absolutely responsible for any loss of the goods intrusted to them, save only when it is due to the act of God or of the King's enemies. In the leading case of *Nugent v. Smith*⁵ the term in question is thus defined by James, L.J. : " The act of God is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to have been expected from him." " What is the act of God ? " says Lord Mansfield in *Forward v. Pittard*.⁶

A narrower meaning of the term act of God discussed.

⁴ (1879) 4 Ex. D. 76.

⁵ (1876) 1 C.P.D. p. 444.

⁶ (1785) 1 T.R. p. 33 ; 1 R.R. p. 147.

"I consider it to mean something in opposition to the act of man. . . . To prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shews it was done by the King's enemies or by such an act as could not happen by the intervention of man, as storms, lightning, and tempests."

If we use the term in this sense, it is not enough to make an accident the act of God, that it is not due to any negligence on the part of any one; there is a second condition to be fulfilled, *viz.*, that it must have resulted directly from natural causes without human intervention. "All causes of inevitable accident, *casus fortuitus*," says Cockburn, C.J. in *Nugent v. Smith*,⁷ may be divided into two classes—those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man." The act of God is the opposite of the act of man.

Thus if a ship is driven ashore by a tempest, this is the act of God; but if it is run ashore during a fog by a mistake however inevitable on the part of the captain, this is the act of man.⁸ So if a building is set on fire by lightning, this is the act of God; but not so if a similar accident happens through the upsetting of a lamp by human agency, even though this was due to no negligence. It is true that in most cases human and natural agency co-operate to produce the result, but the immediate and direct cause is alone to be looked at in determining whether the act is that of God or man. When a ship is cast away in a tempest, this would not have happened but for the act of the owner in sending her to sea, but the loss is the act of God for all that.

4. Adopting this stricter interpretation of the rule in *Nichols v. Marsland*, we reach the following result: The occupier of land is absolutely liable except (1) when the damage is caused by the negligence of a stranger, and (2) when it is directly caused by natural agencies without negligence on the part of any one; but if it is caused directly by human agency, the occupier is liable, even though there is no negligence on the

⁷ (1876) 1 C.P.D. p. 435.

⁸ *Liver Alkali Co. v. Johnson* (1874) L.R. 9 Ex. 338.

part of any one, unless the active agent is a stranger. It is submitted, however, that this is not an accurate statement of the law, and that the distinction between accidents due directly to human agency and those due directly to natural causes (however material in respect of the liability of carriers) is irrelevant in respect of the matter now in hand. Its importance in the former case is based on evidential considerations which are absent in the latter. The reason why a carrier is absolutely liable for the results of human activity but not for the results of natural causes, is that in the former case the law conclusively presumes collusion, fraud, or negligence, while in the latter case the nature of the accident sufficiently rebuts any such presumption. But this is a presumption limited to carriers and certain other classes of persons (doubtless in olden times with sufficient reason)⁹ and it seems odd to extend it to the occupiers of land.

5. In conclusion there are two possible misconceptions as to the term act of God which it may be well to mention. In the first place *all* natural agencies, as opposed to human activities, constitute acts of God, and not merely those which attain an extraordinary degree of violence or are of very unusual occurrence. The distinction is one of kind and not one of degree. The violence or rarity of the event is relevant only in considering whether it could or could not have been prevented by reasonable care; if it could not, then it is the act of God, howsoever trivial or common its cause may have been.

In the second place the standard of care in such cases is not different from and greater than that adopted by the law in other cases. The question here, as elsewhere, is whether the accident could have been prevented by reasonable care; not whether it could have been prevented by any possible or imaginable care. "I find no authority," says Cockburn, C.J. in *Nugent v. Smith*,¹⁰ "for saying that the *vis major* must be such as no amount of human care or skill could have resisted, or the injury such as no human ability could have prevented, and I think this construction of the rule erroneous."

⁹ See *Coggs v. Bernard*, 1 Sm. L.C. p. 185, 11th ed.; D. 4, 9, 1, 1.

¹⁰ (1876) 1 C.P.D. p. 438.

§ 67.—Nuisances in a Highway.

Absolute liability for escape of things from a highway.

1. The law of nuisance applies not merely to the escape of deleterious things from the defendant's own land, but also to their escape from a highway into the adjoining land of the plaintiff, if such escape is caused by the act or default of the defendant. Thus in *Benjamin v. Storr*¹ an action was successfully brought by the occupier of a shop adjoining a public street, in respect of the nuisance of smell and noise caused by the act of the defendant in allowing his horses to stand for an unreasonable time in the street opposite the plaintiff's door.

2. Moreover the rule of absolute liability for nuisance established by *Rylands v. Fletcher* applies to the escape of things from the highway, no less than to their escape from the defendant's own land. He who brings any dangerous thing upon the highway, or interferes with any dangerous thing already there, with the result that it does damage in adjoining property, is absolutely liable without proof of negligence, unless he can prove that the accident was due to the act of a stranger or to the act of God.

Thus in *Midwood v. Mayor of Manchester*² the corporation of Manchester was held liable, apart from any proof of negligence, for an explosion and fire caused by the escape into the plaintiff's house from the adjoining roadway of an inflammable gas created by the fusing of a defective electric cable there laid down by them, and the resulting volatilisation of the bitumen in which the cable was enclosed.

Similarly in *Hardaker v. Idle District Council*³ the defendant council employed an independent contractor to make a sewer in the highway, and by his negligence a gas-pipe was

¹ (1874) L.R. 9 C.P. 400.

² (1905) 2 Q.B. 597.

³ (1896) 1 Q.B. 335. It is submitted that this case is rightly to be explained as a mere application or extension of the rule in *Rylands v. Fletcher*. The reason actually given for the decision, however, is that since the council was under a duty to support the gas pipe, they could not avoid liability by delegating this duty to an independent contractor who did not fulfil it. But this reasoning seems unsatisfactory. If the duty of the council was merely to take due care to support the pipe, then they performed that duty and did not merely delegate it, when they intrusted the work to a contractor whom on good grounds they believed to be competent. The explanation given is intelligible, only if we already assume that the duty of the council was absolute; but this is

left insufficiently supported in the excavation made by him, with the result that it was fractured, and the escaping gas found its way into the plaintiff's house and there exploded. The council was held liable, although the accident was due solely to the negligence of an independent contractor.

3. It is otherwise, however, with dangers incident to the ordinary use of the highway for purposes of traffic. These dangers the adjoining occupiers must submit to and guard themselves against, so long as they are not aggravated by the negligence of him whom they seek to make liable for them. If I hire a cab, I am not responsible if by the negligence of the driver his horse runs away and breaks a shop window. In *Tillett v. Ward*⁴ the defendant drove cattle along the highway, and was held not liable for damage done by the entrance of one of them through the open doorway of the plaintiff's shop. To drive cattle in this way was held to be not in itself an act of negligence, but an ordinary and proper use of the highway ; and for accidents so resulting there is no responsibility save on proof of negligence.

§ 68.—The Legalisation of Nuisances by Prescription.

1. The right to commit a nuisance may be acquired as an easement by prescription. A discussion of the acquisition of easements is appropriate to the law of property rather than to that of torts ; speaking generally, however, we may say that if a nuisance has been continuously in existence for twenty years, a prescriptive right to continue it is acquired as an easement appurtenant to the land on which the nuisance exists. On the expiration of this period the nuisance becomes legalised *ab initio*, as if it had been authorised in its commencement by a grant from the owner of the servient land.¹

Nuisances
legalised by
twenty
years' pre-
scription.

2. It is not sufficient, however, that the operations of the

the very fact to be explained and proved. On the reasoning given in this case it could equally be shown that every person was responsible for the negligence of all persons whom he employed or authorised to do anything on his behalf.

⁴ (1882) 10 Q.B.D. 17.

¹ *Elliotson v. Feetham* (1835) 2 Bing. N.C. 134, 42 R.R. 557 ; *Biss v. Hall* (1838) 4 Bing. N.C. 183, 44 R.R. 697 ; *Sturges v. Bridgman* (1879) 11 Ch.D. 852 ; *Ball v. Ray* (1873) L.R. 8 Ch. 467.

Sturges
v. Bridgman.

defendant which now cause the nuisance have been continued for the space of twenty years; they must have been a *nuisance* for that period. The time runs, not from the day when the cause of the nuisance began, but from the day when the nuisance began. In *Sturges v. Bridgman*² the defendant had for more than twenty years used certain heavy machinery in his business as a confectioner. His premises adjoined the lower end of the garden of the plaintiff, a physician. Some short time before the action the plaintiff built a consulting room at the foot of his garden, and then found that in the use of it he was seriously inconvenienced by the noise of the defendant's machinery. The defendant pleaded a prescriptive right, but the defence was held insufficient, because there had been no actual nuisance until the erection of the plaintiff's consulting room, and until then he had had no right of action.³

3. It follows from the same principle that the nuisance must for twenty years have been a nuisance to the *plaintiff* or his predecessors in title, and that it is not enough that it has been for that period a nuisance to other people in the occupation of other property. The easement can be acquired only against specific property, not against all the world. A noisy or noisy factory may have been for twenty years a nuisance to the house of A, and may yet remain actionable as a nuisance to the newly erected house of B.

Aliter
with public
nuisances.

4. No *public* nuisance can be legalised by prescription. Thus no operation which constitutes a nuisance to a highway can become lawful by any lapse of time.⁴ When, however, the public nuisance is at the same time a private nuisance also, the lapse of twenty years will, it is submitted, legalise the private nuisance and take away all private remedies, although it leaves the public nuisance and the public remedies unaffected. Thus a factory may be a nuisance to the highway as well as to the adjoining proprietors. After twenty years these latter will have no remedy for the private injury, but they may still prosecute for the public injury, or move the Attorney-General to apply on their relation for an injunction to put an end to it.

² (1879) 11 Ch.D. 852.

³ See also *Ball v. Ray* (1873) L.R. 8 Ch. 467.

⁴ 2 Rolle's Abridg. 265; *R. v. Cross* (1812) 3 Camp. 224.

§ 85.—The Legalisation of Nuisances by Statute.

1. When a statute specially authorises a certain act to be done by a certain person, which would otherwise be unlawful and actionable, no action will lie at the suit of any person for the doing of that act. For such a statutory authority is also a statutory indemnity, taking away all legal remedies provided by the law of torts for persons injuriously affected. No compensation is obtainable save that, if any, which is expressly provided by the statute itself. This defence of statutory authority has its most common and important applications in actions of nuisance, and it is therefore appropriately dealt with in the present connection, but it is necessary to note that the rule is one of general application throughout the whole sphere of civil liability.

Statutory
authority for
a nuisance.

2. This statutory authority and indemnity extends not merely to the act itself, but to all its necessary consequences. When the legislature has authorised an act, it must be deemed also to have authorised by implication all inevitable results of that act; for otherwise the authority to do the act would be nugatory. The test of the necessity of a consequence is the impossibility of avoiding it by the exercise of due care and skill. No consequence which can be so avoided is within the scope of the statutory indemnity; every consequence which cannot be so avoided is within that protection.

Thus in *Vaughan v. Taff Vale Railway Co.*¹ the defendant company, having statutory authority to use locomotive steam engines, was held not liable for a fire caused by an escape of sparks, it being proved that the engines were constructed with all due care and skill, and that it was impossible wholly to prevent the escape of sparks. At common law it would have been an actionable nuisance to use engines which were such a source of danger; and it would have been no defence that they had been made as safe as they could be.² Similar

¹ (1860) 5 H. & N. 679. The effect of this decision has been partly excluded by the Railway Fires Act, 1905, which comes into operation on January 1st, 1906, and provides that railway companies shall be liable, notwithstanding their statutory authority, to the extent of one hundred pounds at the most, for damage done to agricultural land or crops by the escape of sparks or cinders from locomotive engines.

² *Jones v. Festiniog Rly. Co.* (1868) L.R. 3 Q.B. 733.

statutory protection is possessed by railway companies in respect of the various other nuisances which are necessarily incidental to the management of their business, *e.g.*, noise and vibration.³

In *The Eastern and South African Telegraph Co. v. Cape Town Tramways Co.*⁴ the Privy Council held that an electric tramway company, acting under statutory powers which authorised it to use the rails for the return circuit, was not liable for a resulting disturbance of the telegraph cables of the plaintiffs by induced currents, as this was a necessary result of the act authorised, and therefore within the scope of the authority.

Similarly in *Dunn v. Birmingham Canal Co.*⁵ the defendant canal company was held not liable, because of its statutory authority, for allowing the escape of water from its canal into the underlying mine of the plaintiff. The defendants had done their best, by puddling and otherwise, to prevent this percolation of water, but in vain. But at common law this would have been no defence, for at common law a person who cannot store water without letting it escape to the injury of his neighbour, must not store it there at all.

Absolute and conditional authority.

3. It is very necessary, however, in the application of the foregoing rule to distinguish between absolute and conditional statutory authority. Absolute authority is authority to do the act notwithstanding the fact that it necessarily causes a nuisance or other injurious consequence. Conditional authority is authority to do the act provided it can be done without causing a nuisance or other injurious consequence. This condition is sometimes expressed,⁶ but is more often left to be implied from the general provisions of the statute. In *Metropolitan Asylum District v. Hill*⁷ a local authority, having statutory authority to erect a small-pox hospital, was restrained from erecting one in a place in which it would have been a source of danger to the residents of the neighbourhood.

³ *Hammersmith Rly. Co. v. Brand* (1869) L.R. 4 H.L. 171; *London, Brighton etc. Rly. Co. v. Truman* (1885) 11 A.C. 45; *Att.-Gen. v. Metropolitan Rly. Co.* (1894) 1 Q.B. 384.

⁴ (1902) A.C. 381. Cf. *National Telephone Co. v. Baker* (1893) 2 Ch. 186.

⁵ (1872) L.R. 7 Q.B. 244; ⁶ 8 Q.B. 42.

⁷ As in *Powell v. Fall* (1880) 5 Q.B.D. 597. ⁷ (1881) 6 A.C. 193.

This statutory authority was construed not as an absolute authority to erect an hospital where the defendants pleased, and whether a nuisance was thereby created or not, but as a conditional authority to erect one if they could obtain a suitable site where no nuisance would result.

On the same principle in *Rapier v. London Tramways Co.*⁸ the defendant company, although authorised to use horse traction, and therefore (by implication) to keep stables, was restrained from maintaining a large stable containing two hundred horses in a place in which the resulting noise and smell caused a nuisance to adjoining residents, even though all due care was used in the management of the premises.

Whether authority is absolute or conditional is a question of construction depending on all the circumstances of the case. Where the authority is imperative and not merely permissive, it is necessarily absolute ; that is to say, when the statute not merely authorises but also directs a thing to be done, then it may be done regardless of any nuisance that flows from it.⁹ An authority which is merely permissive, on the other hand, is *prima facie* conditional only ; for the legislature will not be deemed, in the absence of special reasons for so holding, to have intended to take away the rights of private persons without compensation.¹⁰

4. We have seen that no nuisance falls within the scope of a statutory authority and indemnity unless it is a necessary consequence of the act specifically authorised ; that is to say, unless it cannot be avoided by the use of due care and skill. It is now to be noticed that by due care and skill in this connection is meant not merely that of the defendant himself, but that of all his agents, whether servants or independent contractors. A statutory authority to run locomotive engines includes any escape of sparks which cannot be prevented by any reasonable skill and care in construction, but does not include or legalise an escape due to the incompetence of the engineers who designed or constructed the locomotives, whether these engineers are the company's servants or not.

Liability for
negligence
notwith-
standing
statutory
authority.

⁸ (1893) 2 Ch. 588.

⁹ *Metropolitan Asylum District v. Hill* (1881) 6 A.C. p. 213.

¹⁰ *Ibid.*, pp. 208, 213 ; *Canadian Pacific Railway Co. v. Parke*, L.R. (1899) A.C. 535.

5. What then is the liability of the defendant for consequences which are thus unauthorised, because unnecessary? The answer is that the matter stands exactly as at common law, the statute being inapplicable and irrelevant. If the negligence, therefore, which causes the injurious consequence is that of the defendant himself or his servants, he is liable in all cases. If, however, it is that of an independent contractor, his employer is liable only when a person is at common law liable vicariously for the acts of such a contractor. It is sometimes said, indeed, that statutory authority excludes all such rules of absolute liability—notably the rule in *Rylands v. Fletcher*¹¹—and protects a defendant from all responsibility except for the negligence of himself and his servants. This, however, is not correct. For consequences which are not necessary and therefore not authorised, liability stands as at common law, and if the common law imposes absolute liability in that particular case, it still exists notwithstanding the statute. Thus in *Penny v. Wimbledon Urban Council*¹² the defendant council, though acting in the exercise of statutory powers, was held liable for the negligence of a contractor who was employed by them to repair a road, and who left there a heap of soil unlighted at night to the injury of a passenger. On the same principle in *Holliday v. National Telephone Co.*¹³ the defendant company, laying wires below the public highway under statutory authority, was held liable for the negligence of an independent contractor. So in *Hardaker v. Idle District Council*¹⁴ the defendants were held liable under the rule in *Rylands v. Fletcher* for an escape of gas from the roadway into the house of the plaintiff, although the only negligence was that of an independent contractor, and although the defendants were acting under statutory authority.

§ 70.—Liability for Fire.

1. Liability for damage done by the accidental spread of fire is, it is believed, governed by the same principles as those which determine liability for the escape of any other dangerous thing. For certain reasons, however, and chiefly because of

¹¹ (1868) L.R. 3 H.L. 330.

¹² (1899) 2 Q.B. 72.

¹³ (1899) 2 Q.B. 392.

¹⁴ (1896) 1 Q.B. 335.

the existence of a statute which bears upon the matter, this form of injury is one which requires separate consideration.

The statute referred to is 14 Geo. III. c. 78, s. 86, which provides "that no action, suit, or process whatever shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall accidentally begin." This act repealed certain earlier provisions to the same effect, the first of them being 6 Anne c. 31, which, however, extended only to fires in a "house or chamber." The natural interpretation of this very ill drawn enactment is that it abolishes all liability for accidental fires, whether they are due to negligence or not, and this is the construction put upon the Act of Anne by Blackstone in his Commentaries.¹ Yet whatever may have been the real intention of the legislature, it has been finally determined by the judgment of the Court of Queen's Bench in *Filliter v. Phippard*² that the statute extends only to inevitable accident, and that fires due to negligence are still a source of liability.

Liability for
fire governed
by statute.

2. This being so, the question arises: For whose negligence in the matter of fire is the occupier of the land responsible; only for his own, or also vicariously for that of other persons? This question is left open by *Filliter v. Phippard*, but receives a partial answer in the case of *Black v. Christchurch Finance Co.*,³ in which the occupier was held liable for the act of an independent contractor who negligently and in disregard of his instructions lit a fire on the defendants' property at a dangerous and improper season of the year. It is clear from this case that the liability of an occupier for negligent damage by fire is not limited to his own negligence and to that of his servants acting in the course of their employment. How far then does it extend? There seems no reason for supposing that it is any more restricted than his liability for the escape of any other dangerous substance; and if this is so, it probably extends to the negligent acts of all persons lawfully on the premises with the occupier's permission, whether they are servants, contractors, members of his family, or licensees. But for the act of a stranger he is not responsible in this any more than in other cases.⁴

¹ I. 431.

² (1847) 11 Q.B. 347; 75 R.R. 401.

³ (1894) A.C. 48.

⁴ See above, p. 198.

Statute
merely
declaratory.

If this is so, the statute of 14 Geo. III. as interpreted by *Filliter v. Phippard* is probably merely declaratory of the common law, for this seems to be the rule indicated by the common law decisions prior to the Act of Anne. Thus in the old case of *Beaulieu v. Finglam*⁵ it is said by Markham, J. : " A man is bound in such a case to answer for the acts of his servant or his ostler. For if my servant or my ostler fix a candle against the wall, and the candle fall into the thatch and burn down all my house and my neighbour's house too, in that case I must answer to my neighbour for the damage done to him. . . I shall have to answer to my neighbour for any one who enters my house by my will or my knowledge, or is received by me or by my servant as a guest, if he do any act (as with a candle or anything else) by which my neighbour's house is burned. But if a man from outside my house against my will puts fire into the thatch of my house or anywhere else, whereby my house is burned and in consequence my neighbours' houses are burned too, I shall not be bound to answer to them for this." In a somewhat less ancient case⁶ it is said : " If my friend come and lie in my house and set my neighbour's house on fire, the action lieth against me." And in *Turberville v. Stampe*⁷ Holt, C.J., says : " If a stranger set fire to my house, and it burns my neighbour's, no action will lie against me."

3. It is sometimes said, indeed, that the common law, before the Act of Anne, held an occupier absolutely liable for damage done by fire independently of any negligence either on his part or on that of any one else. There is, however, no sufficient authority for any such doctrine, and it is contrary to the clear opinion of Holt, C.J., and the Court of King's Bench in *Turberville v. Stampe*,⁷ decided before the Act of Anne. It is there clearly recognised that liability for fire is based on the negligent lighting or care of it. " He must at his peril take care that it does not through his neglect injure his neighbour. If he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground and prejudice him, this is fit to be given in evidence."⁸

⁵ Y.B. 2 Henry IV. 18, pl. 5. See Kenny's Cases on the Law of Torts, p. 589. ⁶ *Crogate v. Morris*, 1 Brownl. & Goldes. 197.

⁷ (1697) 1 Ld. Raym. 264.

⁸ 12 Mod. p. 152.

Yet however this may have been before the statute, it is submitted that since the statute there can be no liability for accidental fire in the absence of any negligence on the part of any one concerned. The present law is a rule of vicarious liability for the negligent acts of all persons except mere strangers—not a rule of absolute liability for accidents for which no one is to blame. This, it will be remembered, is the interpretation which we have already placed on the general rule in *Rylands v. Fletcher* as modified by *Nichols v. Marsland*;⁹ and if this is correct, liability for fire stands on exactly the same basis as liability for water or any other dangerous thing.

No liability for fire apart from negligence on the part of some one.

4. It is sometimes maintained¹⁰ that even at the present day, and notwithstanding the statute, liability for fire is absolute and independent of negligence. Those who hold this opinion seek to evade the statute by construing the words "shall accidentally begin" as applicable only to fires that are accidental in their *origin*, and not to fires intentionally lit but accidentally spreading and escaping from the defendant's land. The statute would apply, for example, to a fire caused by lightning or spontaneous combustion, but not to one caused by the bursting of a lamp. This interpretation is suggested in *Filliter v. Phippard*¹¹ itself, as a second and supplementary ground for the decision. It is submitted, however, that it is unsound. It seems sufficiently clear that the statute was not intended to apply solely to fires caused by lightning or spontaneous combustion, and that the accidental burning of a house by the explosion of a lighted lamp is as much within the Act as a similar accident caused by an explosion of gunpowder.

The cases of *Jones v. Festiniog Rly. Co.*¹² and *Powell v. Fall*,¹³ which are sometimes cited as authorities for the proposition that liability for fire is absolute, do not in reality admit of any such interpretation. In these cases the defendants were held liable for fire caused by the escape of sparks from locomotive steam engines used by them, and it was held to be no defence that all possible care and skill had been used in the construction and management of these engines

⁹ *Supra*, p. 200.

¹⁰ See Clerk & Lindsell's Law of Torts, p. 436. 4th ed.

¹¹ (1847) 11 Q.B. 347; 75 R.R. 401.

¹² (1868) L.R. 3 Q.B. 733.

¹³ (1880) 5 Q.B.D. 597.

to prevent the escape of sparks. In neither case was the engine used under any statutory authority which granted any protection against the ordinary rule of liability at common law. It seems clear that these are not cases of absolute liability for fire at all, but are merely illustrations of the familiar principle, already considered by us,¹⁴ that if any operation cannot be carried on without causing damage by the escape of deleterious or dangerous things, the carrying on of that operation is an actionable nuisance, and it is no defence that all possible care and skill were used to prevent or minimise the damage done by it. He who cannot by any care or skill carry on the business of a saw-mill without annoyance to his neighbours, cannot lawfully do so at all, except by agreement with his neighbours or under the protection of statutory authority. This liability is not independent of negligence, for the very act of conducting an operation which cannot by care and skill be rendered innocuous is itself an act of negligence. The argument in these two cases, therefore, was devoted almost wholly to the question whether there was or was not any statutory authority sufficient to legalise the use of these dangerous instruments and to save the defendants from their undoubted common law liability.¹⁵

Duty
to extinguish
fires.

5. We have seen that the occupier of land is not vicariously liable in respect of a fire caused by the negligence of a stranger. Does he owe to his neighbour any duty at all in respect of such a fire? Is he bound to use any care to prevent or extinguish it, or is he at liberty to leave it alone on the ground that it is not his fire and therefore not his business? On this point there is no authority, but it would seem difficult to maintain that any such obligation or liability exists.

Summary
as to fire.

6. We may summarise the conclusions which we have reached in this matter in the form of the following three rules:

- (a) The occupier of land from which fire escapes is liable if the escape is due to any negligence on the part of himself, his servant, an independent contractor intrusted

¹⁴ *Supra*, p. 189.

¹⁵ The liability of Railway Companies for fires caused by the escape of sparks or cinders from locomotives is now governed by the Railway Fires Act, 1905. See p. 207, n. 1. *ante*.

with the lighting or custody of fire, or probably any other person lawfully on the land with the occupier's permission.¹⁶

- (b) He is not responsible for the act of a stranger, or for damage which is not caused by negligence on the part of any one.¹⁷
- (c) He is probably under no duty to extinguish fires for the lighting of which he is not responsible.

§ 71.—The Incidence of Liability for Nuisances.

1. Hitherto we have confined our attention to the nature of the wrong of nuisance, and have postponed any inquiry into the incidence of liability for it. We have assumed throughout that the person liable in every case is the occupier of the land on which the cause of the injury exists. This, however, although generally true, is not invariably so, nor is it the whole truth, and we have now to deal with the matter more definitely. As the law on this point is identical with respect to nuisances strictly so called and to the disturbance of servitudes, we shall deal with these two injuries together in this connection, and shall in so doing use the term nuisance in its wide sense to include both.

2. Speaking generally the occupier of premises is liable for all nuisances which exist upon them during the period of his occupancy. His duty is not merely to refrain from positive acts of misfeasance which cause a nuisance, but also to take care that a nuisance does not come into existence and to abate it if it does. "I have the control and management," says Abbott, C.J.,¹ "of all that belongs to my land or my house, and it is my fault if I do not so exercise my authority as to prevent injury to another." Thus the tenant of a dwelling house is responsible if it so falls into disrepair as to be a source of

Occupier
liable for all
nuisances.

¹⁶ *Filliter v. Phippard* (1847) 11 Q.B. 347, 75 R.R. 401; *Black v. Christchurch Finance Co.* (1894) A.C. 48; *Turberville v. Stampe* (1697) Ld. Raym. 264, 12 Mod. 152; *Beaulieu v. Finglam*, Y.B. 2 Henry IV. 18, pl. 5.

¹⁷ 14 Geo. III. c 78. s. 86; *Turberville v. Stampe* (1697) 1 Ld. Raym. 264, 12 Mod. 152; *Beaulieu v. Finglam*, Y.B. 2 Henry IV. 18, pl. 5.

¹ *Laugher v. Pointer* (1826) 5 B. & C. p. 576; 29 R.R. p. 338.

danger to the adjoining highway.³ So in *White v. Jameson*³ the occupier of land was held liable for a nuisance caused by a licensee through the burning of bricks upon the premises.

Even when they exist when he becomes the occupier.

3. Similarly an occupier is liable even for a continuing nuisance which already existed on the premises when he first entered into possession of them. For it is his duty either to refrain from taking possession of such premises or else to abate the nuisance so soon as he becomes the occupier. Thus in *Broder v. Saillard*⁴ the tenant of a house was held liable for a continuing nuisance to the adjoining house caused by the percolation of water through an artificial mound of earth which existed on the demised premises at the commencement of the tenancy. So in *Brent v. Haddon*⁵ an action was successfully brought against the tenant of a mill for the continuance of a weir wrongfully erected before the commencement of his lease. So the tenant of a house which obstructs the plaintiff's lights is responsible therefor.⁶ So also with the purchaser of land on which a nuisance exists.⁷ So in *Coupland v. Hardingham*⁸ the occupier of a house was held liable for injuries caused by a dangerous unfenced area abutting on the street, although the premises were in the same condition when his occupation commenced.^{9 10}

Occupier not liable for nuisances created by a stranger.

4. An occupier, however, is not responsible for a nuisance created on his land by the act of a stranger without his per-

³ See *Pretty v. Bickmore* (1873) L.R. 8 C.P. 401.

³ (1874) L.R. 18 Eq. 303.

⁴ (1876) 2 Ch.D. 692.

⁵ Cro. Jac. 555.

⁶ *Rypton v. Bowles*, Cro. Jac. 373; *Roswell v. Prior* (1701) 12 Mod. 635.

⁷ *Penruddock's Case*, 5 Co. Rep. 100 b.; *Roswell v. Prior* (1701) 12 Mod. 635.

⁸ (1813) 3 Camp. 398; 14 R.R. 764.

⁹ It has been said that no action will lie against an occupier for a mere failure to abate a nuisance which existed at the commencement of his occupation, until and unless he has been requested by the plaintiff to abate it. *Penruddock's Case*, 5 Co. Rep. 100 b.

¹⁰ Notwithstanding the general principle that an occupier is liable for a continuing source of mischief even though created before his occupancy, it has been held in two cases that a mine-owner is not liable for a subsidence happening during the period of his occupancy by reason of the excavation of minerals in the time of his predecessor in title. *Hall v. Duke of Norfolk* (1900) 2 Ch. 493 (Kekewich, J.); *Greenwell v. Low Beechburn Coal Co.* (1897) 2 Q.B. 165 (Bruce, J.)

mission or authority. The only duty of an occupier in such circumstances is, it would seem, to allow the person injured by the nuisance to enter and abate it. Thus in *Saxby v. Manchester Railway Co.*¹¹ it was held by the Court of Common Pleas that the occupier of land was not liable for the continuance thereon of a weir erected by a trespasser, without his authority and against his will, to the obstruction of the plaintiff's water rights. The only remedy of the plaintiff was to enter and abate the nuisance, and the defendant owed him no duty except to allow him to exercise this right of self-help. It is by no means clear, however, how far this rule of exemption from liability really goes, and the law on this matter is ill developed and unsatisfactory.

5. He who by an act of misfeasance creates a nuisance is liable for it, and for any continuance of it, notwithstanding the fact that it exists on land which is not in his occupation, and that he has therefore no power to put an end to it. Thus if any building obstructs ancient lights, or interferes with any other servitude, the builder is liable no less than the occupier of the land on which the building stands.¹² Moreover this liability is a continuing one, extending not merely to the wrongful act itself, but to the continuance of the wrongful state of things which results from it. It is no defence that the defendant has no power to abate or put an end to this state of things, for he ought not to have created it.¹³

Liability of him who creates a nuisance on another's land.

6. Does a person who is in occupation of premises on which there is a nuisance, and who is liable for that nuisance by virtue of his occupation, cease to be so liable when he ceases to occupy? Does a vendor of land, for example, put off his responsibility along with his ownership? Or does the liability of a tenant cease with the assignment, surrender, or determination of the lease? On this point there is little authority, but it is submitted that, except in the case of nuisance by positive misfeasance, liability dependent on occupation lasts only so long as the occupation on which it is

Liability of occupier after occupation ceases.

¹¹ (1869) L.R. 4 C.P. 198.

¹² *Thompson v. Gibson* (1841) 7 M. & W. 456, 56 R.R. 762; *Dalton v. Angus* (1881) 6 A.C. 740.

¹³ *Thompson v. Gibson* (1841) 7 M. & W. 456, 56 R.R. 762; *Roswell v. Prior* (1701) 12 Mod. 635.

based. The owner of a ruinous house ceases to be liable for it so soon as he has sold it, just as the owner of a dangerous animal transfers his liability to the purchaser of it.

In the case of positive misfeasance, however, this is not so. Liability of this kind is based not on occupancy but on the doing of the act which creates the nuisance, and its continuance, therefore, is independent of the ownership or occupation of the property on which the act is done. Thus he who builds a house which obstructs ancient lights remains liable for the continuance of that obstruction, even after he has sold the property.¹⁴

§ 72.—Liability of a Landlord.

Landlord
commonly
not liable.

1. It is established law that the owner of premises is not as such liable for nuisances which exist upon them. Responsibility for injuries of this kind is based not on ownership, but on possession. No action, therefore, will in general lie against a landlord for any nuisance existing on premises leased by him to a tenant, the sole remedy being against the tenant.¹

There are, however, certain exceptional cases in which the landlord is responsible, though it is not easy, in the present unsatisfactory state of the authorities, to say definitely how far these exceptions extend, and on what principle they are based.

Landlord
liable if he
creates a
nuisance.

2. In the first place, it seems clearly settled that when the landlord has, prior to the lease, created a nuisance on the premises by a positive act of misfeasance, for example, the erection of a building obstructing ancient lights (as opposed to a mere nonfeasance, such as an omission to repair) he remains liable for the continuance of that nuisance, even after he has leased the property to a tenant.² Even a stranger is, as we have seen,³ similarly liable for a nuisance due to his misfeasance, though he is not in occupation of the premises at all; *a fortiori* the owner of the property. So also if he sells the

¹⁴ *Roswell v. Prior* (1701) 12 Mod. 635.

¹ *Cheetham v. Hampson* (1791) 4 T.R. 318, 2 R.R. 397; *Russell v. Shenton* (1842) 3 Q.B. 449, 61 R.R. 249; *Pretty v. Bickmore* (1873) L.R. 8 C.P. 401; *Gwinnell v. Eamer* (1875) L.R. 10 C.P. 658.

² *Roswell v. Prior* (1701) 12 Mod. 635.

³ *Thompson v. Gibson* (1841) 7 M. & W. 456; 56 R.R. 702.

property, instead of merely leasing it.⁴ The liability of the landlord in such a case is concurrent with, and not exclusive of that of the tenant.⁵

3. A second case in which the landlord is liable is when he has expressly or impliedly authorised his tenant to create or continue the nuisance. In *Harris v. James*⁶ a landlord was held liable for a nuisance caused by the act of his tenant in blasting operations and the burning of lime, on the ground that the land was let to him for that very purpose, which was necessarily a nuisance. "There can be no doubt," says Blackburn, J.,⁷ "that where a person authorises and requires another to commit a nuisance, he is liable for that nuisance, and if the authority be given in the shape of a lease, he is not the less liable." If, however, the purpose for which the lease is granted is not such as necessarily to cause a nuisance, the landlord is not responsible merely because a nuisance is in fact created by the manner in which the tenant chooses to conduct his operations. On this principle in *Rich v. Basterfield*⁸ it was held that a landlord was not responsible for a nuisance caused by the smoke of defective chimneys—it being possible for the tenant to avoid the commission of the nuisance, as for example by the use of coke instead of coal.⁹ Nor in such a case is the landlord to be deemed to authorise the nuisance simply because, with knowledge of its existence, he refrains from exercising his right of determining the tenancy.¹⁰

4. A third exception to the general rule of the landlord's exemption from liability exists, it would seem, when the nuisance is due to a breach by him of the covenants of the lease; for example, when the premises are allowed by him to

⁴ *Roswell v. Prior* (1701) 12 Mod. 635. .

⁵ *Brent v. Haddon*, Cro. Jac. 555; *Ryppon v. Bowles*, Cro. Jac. 373; *Roswell v. Prior* (1701) 12 Mod. 635.

⁶ (1876) 45 L.J. Q.B. 545.

⁷ At p. 546.

⁸ (1847) 4 C.B. 783; 72 R.R. 716.

⁹ In *Harris v. James* (1876) 45 L.J. Q.B. 545, however, this case was criticised in respect of the application of the general principle to the facts—a nuisance being the necessary result of the mode of user contemplated by the landlord, namely the consumption of coal. Cf. *Rex v. Pedley* (1834) 1 A. & E. 822; 40 R.R. 444.

¹⁰ *Bowen v. Anderson* (1894) 1 Q.B. 164; *Gandy v. Jubber* (1864) 5 B. & S. 78, 9 B. & S. 15.

fall into a dangerous state of disrepair, and the duty of repair is cast upon him by the terms of the lease. This seems to have been the ground of decision in the unsatisfactory case of *Payne v. Rogers*,¹¹ and the same doctrine has been repeatedly recognised in subsequent judicial dicta, though there seems to be no other actual decision.¹²

It seems anomalous that the terms of the contract between landlord and tenant should operate *inter alios*, so as to determine the liability of either of them to third persons, and the rule, if sound at all, is probably to be explained as merely a special application of the doctrine of authorisation already considered by us. That is to say, a landlord who himself undertakes the duty of repair and disregards it, must be taken to have authorised his tenant to leave the premises in a state of disrepair, and is to be held liable accordingly. This is the view expressed by Keating, J., in the case of *Pretty v. Bickmore*:¹³ "In order to render the landlord liable in a case of this sort, there must be some evidence that he authorised the continuance" (of the nuisance); "for instance, that he retained the obligation to repair the premises; that might be a circumstance to show that he authorised the continuance of the nuisance."¹⁴

Or if premises let with nuisance on them.

5. The fourth and last case in which a landlord is or may be liable, is when the nuisance existed at the commencement of the tenancy, and the premises were let without any covenant on the part of the tenant to repair or otherwise discontinue or prevent the nuisance. This is apparently the result of the cases of *Todd v. Flight*¹⁵ and *Gandy v. Jubber*,¹⁶ as qualified

¹¹ (1794) 2 H.Bl. 350; 3 R.R. 415.

¹² See *Rex v. Peddy* (1834) 1 A. & E. 822, 40 R.R. 444; *Todd v. Flight* (1860) 9 C.B. (N.S.) 377; *Pretty v. Bickmore* (1873) L.R. 8 C.P. 401; *Nelson v. Liverpool Brewery Co.* (1877) 2 C.P.D. 311.

¹³ (1873) L.R. 8 C.P. p. 405.

¹⁴ It is suggested in *Payne v. Rogers* (1794) 2 H. Bl. 350, 3 R.R. 415, that when the duty of repair is thus imposed by contract on the landlord, the tenant is thereby exempted from any liability to strangers. But there is no authority for this, and it is contrary to principle. It is also to be observed that the landlord's contract to repair, though it may make him liable to outsiders for a nuisance, does not make him liable for injuries suffered by persons entering upon the premises. *Cavalier v. Pope* (1906) A.C. 428.

¹⁵ (1860) 9 C.B. (N.S.) 377. ¹⁶ (1864) 5 B. & S. 78; 9 B. & S. 15.

and limited in their operation by the later cases of *Pretty v. Bickmore*¹⁷ and *Gwinnell v. Eamer*.¹⁸ Here also the rule is probably to be regarded as merely an application of the rule as to authorisation. By letting the premises with the nuisance already existing, the landlord is to be deemed to have authorised its continuance, unless he has taken a covenant from the tenant binding him to discontinue it. The authorities on the whole matter are, however, in an unsatisfactory state.¹⁹

6. The law as to the liability of a landlord may be summed up as follows, subject, however, to the doubts that have already been expressed : Summary.

The landlord of premises on which a nuisance exists is not liable therefor except in the following cases :

- (a) When he has himself created the nuisance by a positive act of misfeasance.
- (b) When he has authorised the creation or continuance of the nuisance by his tenant.
- (c) When the nuisance is due to a breach by the landlord of the covenants of the lease.
- (d) When he has let the premises with the nuisance already existing upon them, without taking any covenant from the tenant to prevent or discontinue it.

¹⁷ (1873) L.R. 8 C.P. 401.

¹⁸ (1875) L.R. 10 C.P. 658

¹⁹ It may be that if the landlord actually knows of the nuisance at the date of the letting he is liable even if he takes a covenant from his tenant. *Gwinnell v. Eamer* (1875) L.R. 10 C.P. p. 661, *per* Brett, J. However this may be, it is settled that the mere continuance of a determinable tenancy (for example, a tenancy from year to year, or a weekly tenancy) is not to be deemed a reletting, so as to make the landlord responsible for nuisances which have come into existence since the beginning of the term. *Bowen v. Anderson* (1894) 1 Q.B. 165; *Gandy v. Jubber* 9 B. & S. 15.

CHAPTER VIII.

INJURIES TO SERVITUDES.

§ 73.—Kinds of Servitudes.

Servitudes
defined.

1. A servitude is a right to the use or benefit of another person's land, unaccompanied by any right to the possession of it. Examples are rights of way, rights of light, rights to the support of land or buildings by the adjoining land or buildings, rights of shooting or fishing, and rights of extracting minerals. The land or tenement upon which a servitude is imposed is called the *servient* land or tenement. If, as often happens, the servitude exists for the benefit of another piece of land, and therefore runs with this land into the hands of successive owners, this is termed the *dominant* land or tenement. A servitude which is thus attached to and runs with a dominant tenement is said to be *appurtenant* to it. When there is no dominant tenement, the servitude is said to be *in gross*.

The essential difference between a lease of land and a servitude is that the lease gives a right to the exclusive possession of the property, whereas a servitude does not.¹ Thus the question whether an agreement for a lodging in another's house amounts to a lease of part of that house, or merely to a licence to use it (*i.e.*, a particular kind of servitude), depends on whether the lodger has or has not acquired by his agreement exclusive possession of that part of the house.² So if one agrees with a landowner to be allowed to place a hoarding for advertisements on certain vacant land,

¹ *Glenwood Timber Co. v. Phillips* (1904) A.C. p. 408.

² *Wright v. Stavert* (1860) 2 E. & E. 721; *Edge v. Strafford* (1831) 1 C. & J. 391, 35 R.R. 746.

the question whether this is a lease of the land on which the hoarding stands, or a mere servitude over it, is one which depends upon the same consideration.

2. Servitudes are either public or private. A public servitude is a right of user vested in the public at large or in some portion of it, such as the inhabitants of a certain parish. The most important example is a public highway—*i.e.*, a public right of way over land vested either in private persons or in local authorities. Another example is the right of navigation and fishing in a navigable river. Private servitudes, on the other hand, are those which are vested in particular individuals.

Public and private servitudes.

3. Private servitudes are either legal or equitable. Legal servitudes bind and run with the servient land *at law*; that is to say, they are protected from disturbance not merely against the grantor, but also against all subsequent owners and occupiers of the servient land, and against the world at large. Equitable servitudes on the other hand bind and run with the servient land only *in equity*; that is to say, they are not protected against any subsequent purchaser of the servient land who acquires the property without notice of the existence of such equitable rights over it.

Legal and equitable servitudes.

4. Legal servitudes are of two kinds, distinguished as easements and profits (or profits *à prendre*). Equitable servitudes are also of two kinds, distinguished as licences and restrictive contracts. We shall consider these four classes in their order.

Easements and profits.

§ 74.—Easements.

1. An easement is a legal servitude imposed upon one piece of land for the benefit of another piece, running with each of these tenements at law, and not being the kind of servitude called a profit. Examples of easements are rights of way, rights of light, and rights of support.

Easements defined.

2. The distinction between an easement and a profit is that a profit entitles its owner to take away and appropriate some part of the produce or substance of the servient land, whereas an easement entitles him merely to the use or benefit of the land without any such appropriation. Thus a right of

way or of support is an easement, but a right of pasturage or of fishing or of mining is a profit. It is to be noted, however, that a right to take *water* is an easement and not a profit.¹

No easements in gross.

3. Every easement necessarily involves both a dominant and a servient tenement. That is to say, an easement is always appurtenant and never in gross.² It can only exist for the benefit of another piece of land, so that the benefit of it runs with that land into the hands of successive owners. A right to enter upon or cross the land of another, for example, which is personal and not connected with the occupation and use of some other adjoining land, cannot amount to a legal easement, though it may, as we shall see, amount to a valid equitable servitude. A profit on the contrary, may be either in gross or appurtenant,³ and this is the chief practical importance of the distinction between it and an easement. A personal right of fishing or mining on another's land may be a good legal servitude; but a personal right of way or entry is at the most an equitable one.

Positive and negative easements.

4. Easements are either positive or negative. A positive easement is a right to enter upon the servient land or to do some other act in relation thereto which would otherwise be illegal. A negative easement is a right that the owner of the servient land shall refrain from doing some act which he would otherwise be entitled to do: *e.g.*, the erection of a building which would obstruct his neighbour's lights. In other words, the obligation of the owner of the servient land consists either *in patiando* (*i.e.*, in suffering the dominant owner to do an act on or in relation to the servient land), or *in non faciendo* (*i.e.*, in refraining from doing some act on the servient land). In the first case the servitude is positive, and in the second negative.

Natural and acquired easements.

5. Easements are either natural or acquired. Natural easements are those which are naturally appurtenant to land, and therefore require no special mode of acquisition. Thus the right of land, unencumbered by buildings, to the support

¹ *Race v. Ward* (1855) 4 E. & B. 702.

² *Ackroyd v. Smith* (1850) 10 C.B. 164; *Rangelcy v. Midland Rly. Co.* (1868) L.R. 3 Ch. at p. 310; Gale on Easements, p. 11, 7th ed.

³ *Fitzgerald v. Firbank* (1897) 2 Ch. 96.

of the adjoining land is a natural easement ; but the right of a building to the support of adjoining land or buildings is an acquired easement. The term easement is sometimes limited to the second of these two classes, but as natural easements are essentially of the same nature as those which are acquired, this limitation of the term seems inadvisable.

6. Easements are created by deed, prescription, or grant How created. implied in law (e.g., a way of necessity). A mere agreement not under seal creates at the most an equitable servitude, not a legal easement. This is so whatever is the intended duration of the right in question. A mere agreement is as powerless to create a legal right of way for the term of a year, as to create such a right in perpetuity.⁴

7. It is not possible to create new kinds of easements not already known to the law. The class of these rights is closed and is not capable of indefinite increase at the will and caprice of an owner of land.⁶ The chief recognised easements are (1) rights of way, (2) rights of entry for any purpose relating to the dominant land,⁷ (3) rights in respect of the support of land and buildings, (4) rights of light and air, (5) rights in respect of water, (6) rights to do some act which would otherwise amount to a nuisance to the servient land,⁸ (7) rights of placing or keeping things on the servient land.⁹

There can be no easement consisting in a right to an uninterrupted view from the windows of a house,¹⁰ or in a right to the uninterrupted view of one's business premises

⁴ *Hewlins v. Shippam* (1826) 5 B. & C. 221, 31 R.R. 757 ; *Holford v. Bailey* (1850) 13 Q.B. p. 446.

⁶ *Achroyd v. Smith* (1850) 10 C.B. 164 ; *Hill v. Tupper* (1863) 2 H. & C. 121 ; *Keppel v. Bailey* (1834) 2 M. & K. at p. 535, *per* Lord Brougham : "It must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner." *Leech v. Schweder* (1874) L.R. 9 Ch. at p. 475 ; *Nuttall v. Bracewell* (1866) L.R. 2 Ex. p. 10.

⁷ E.g., a right to enter and open sluices to prevent flooding. *Simpson v. Godmanchester Corporation* (1897) A.C. 696.

⁸ E.g., a right to conduct a noisy or otherwise offensive business. See above, p. 205.

⁹ E.g., a right to have a sign post or sign board on the adjoining land or building. *Hoare v. Metropolitan Board of Works* (1874) L.R. 9 Q.B. 296 ; *Moody v. Steggles* (1879) 12 Ch.D. 261.

¹⁰ *Leech v. Schweder* (1874) L.R. 9 Ch. at p. 475.

from the public road ;¹¹ nor can there be any right of privacy amounting to a legal easement, a right, for example, that the owner of a house shall not open windows in it so as to overlook the adjoining garden.¹² For the same reason a covenant under seal not to build on land, or not to use the premises as a shop, does not constitute a legal easement which will bind that property in the hands of all successive owners, but creates at the most an equitable servitude which will run with and bind the property in equity.¹³

Disturbance
of easements.

8. Any act done without lawful justification either by the owner of the servient land or by a stranger, which interferes with the exercise or enjoyment of any easement, is a tort actionable at the suit of him who is in lawful possession of the dominant land. What acts amount to such an actionable interference is a question which depends on the contents or scope of the particular easement concerned, and to which no general reply can here be given. The more important easements will receive detailed examination later.

9. The right of action, if any, possessed by the *reversionary owner* of land with regard to the disturbance of easements appurtenant to it will be dealt with later. Disturbance of an easement, like trespass, is in general an attack upon the rights of the possessor of the dominant land, not on those of the owner of it. Any right of action vested in the owner as such is exceptional.¹⁴

¹¹ *Butt v. Imperial Gas Co.* (1866) L.R. 2 Ch. 158.

¹² *Turner v. Spooner* (1861) 30 L. J. Ch. 801.

¹³ *Tulk v. Moxhay* (1848) 2 Ph. 774.

¹⁴ We have already seen how in case of trespass, dispossession, and nuisance, mere *de facto* possession is a sufficiently good title against a wrongdoer, and we shall see later that the same rule is applicable in the case of injuries to chattels also. We have here to consider how far, if at all, a similar principle is recognised in respect of the disturbance of servitudes. This, however, is a difficult question which has received very little consideration, and in the absence of adequate authority it must be dealt with mainly on principle.

The possession of a servitude is of two kinds :—

(1) The use and enjoyment without legal title of a legal servitude vested in some other person, as when I occupy without title land to which a right of ancient lights or a right of way is legally appurtenant.

(2) The use and enjoyment of a mere *de facto* servitude : as when the owner of a house is *de facto* in the possession of support afforded to

§ 75.—Profits.

1. A profit (profit à *prendre*) is a legal servitude consisting in the right to enter upon the servient land and take away part of its substance or produce : for example, minerals, stone, clay, timber, herbage, fish, or game. Profits defined.

A profit differs from an easement in two ways. In the first place, a profit always comprises a right to take something from the servient land, whereas an easement never does. In the second place, a profit may be either appurtenant to a dominant tenement or in gross, whereas an easement is

it by the adjoining land, or of the access of light to his windows, no legal right to such support or light having been acquired by grant, prescription, or otherwise.

As to the first of these modes of possession it may be said with some confidence that a possessory title to land will bring with it a possessory title to all servitudes legally appurtenant to that land, and that the disturbance of such a servitude by any *stranger* (i.e., any person other than the lawful owner or occupier of the servient land) is actionable at the suit of the possessory owner. Such a stranger could no more plead the *jus tertii* in an action for the disturbance of a right of way, light, or support, than in an action for trespass or nuisance.

What shall be said, however, of an action against the servient owner himself, as opposed to a mere stranger ? Can he plead the *jus tertii* of the true dominant owner ? Probably in this case a distinction must be drawn between natural and acquired servitudes. In the case of natural servitudes a possessory title is probably valid even against the servient owner ; in the case of acquired servitudes such a title is probably invalid, and the servient owner could plead that the person to whom the servitude had been granted was neither the plaintiff nor any person through whom he claimed. If this is so, the possessory owner of the dominant land can sue the servient owner for disturbing his right of support, or his riparian right to the flow of a natural stream (for these are natural incidents of his possessory ownership of the land), but he has no cause of action against the servient owner for blocking his ancient lights or preventing his use of a right of way, for in such a case he would have to plead and prove his title to an acquired easement.

We come now to the second form assumed by possessory titles to servitudes, viz., that which is based on the mere use and enjoyment of a *de facto* servitude which has no legal existence as against the land over which it is enjoyed : for example, the actual access of light to a window, the actual support of a house by the adjoining land, the actual supply of underground water to a well, the actual use by trespass or licence of a way over another's land. Such *de facto* servitudes possess, of course, no protection as against the owner of the quasi-servient land ; but the question which we have to consider is whether they are not

necessarily appurtenant. Thus a right conferred on a person to enter upon another's land for the purpose of mere recreation can not be a legal servitude of any kind, even though granted by deed ; for it is not a profit, and it cannot be an easement because it is merely in gross. But on the other hand, a right conferred by deed to enter on another's land for the purpose of fishing or hunting is a legal servitude, because a validly constituted profit.¹⁵

A profit is created in the same manner as an easement, *viz.*, by deed and prescription. A mere agreement not under seal creates, however, a good equitable servitude of the same nature as a legal profit, except that it runs with the servient land in equity only.

Disturbance
of profits.

2. Any act done without lawful justification whether by the owner of the servient land or by a stranger, which inter-

protected *adversus extraneus*. If a trespasser on the adjoining land injures my house by interfering with its *de facto* support, or blocks up my modern windows, will he be permitted to plead that I have acquired no legal servitude over the land, entitling me to such support or light, or will my mere possession of these things be recognised as a sufficient title to them as against him and all other strangers ?

To this question it is not possible to answer simply either Yes or No, for distinctions must be drawn. It is clear both on principle and authority that in certain cases at least such a possessory title is sufficient. Thus in *Jeffries v. Williams* (1850) 5 Ex. 792, and *Bibby v. Carter* 4 H. & N. 153, it was held that it was an actionable wrong for a stranger to do damage to a house by interfering with the support received by it from adjoining land, even though no right to that support had been acquired against the owner of that land. On the other hand, it seems clear on principle that we cannot extend this rule to cover all cases of the *de facto* enjoyment of servitudes. It cannot be the law that a mere trespasser who has been in the habit of crossing another man's land can sue a stranger for an act which obstructs his use of this *de facto* easement. Nor can it be supposed that a poacher can sue a stranger who by polluting the water of a stream has interfered with his practice of catching fish therein. What then is the distinction between these two classes of cases ? To what forms of *de facto* possession does the principle recognised in *Jeffries v. Williams* apply ?

It is submitted that the true principle is this :—As against strangers the possessor of land is entitled to the use and enjoyment of it free from all harmful interference due to acts done on the adjoining land ; and all such interference by a stranger is actionable, even though had it been done by the lawful owner of the adjoining land, it would have been *damnum sine injuria* because of the absence of any acquired

feres with the exercise or enjoyment of any profit, is a tort actionable at the suit of him in whom the profit is legally vested in possession. Thus in *Fitzgerald v. Firbank*¹⁵ the grantees for a term of years of a right of fishing in a river were held entitled to receive damages from a railway contractor who in the course of his work discharged such quantities of muddy water into the river as to drive away the fish.

What acts amount to an actionable disturbance of a profit is a question which depends on the scope and nature of the particular profit concerned, and which does not admit of any general answer. The rights of the reversionary owner of a profit are dealt with later, and as to those of a possessory owner reference may be made to the preceding note as to possessory titles to servitudes.¹⁷

servitude making it illegal. Where, on the other hand, the act complained of has produced no harmful effects upon the plaintiff's land, it is necessary for him to plead and prove, even against a stranger, that he has a legal right to the benefit of which he complains that he has been deprived. Thus, if this is so, a landowner can sue a stranger not merely, as we have already seen, for interfering with *de facto* support, but also for blocking up his windows, or for withdrawing his supply of underground water, or for cutting the roots and branches of his trees which spread into the adjoining land, or for causing a harmful percolation of water from the neighbouring mine into his. All of these acts are lawful if done by the adjoining owner himself; unlawful, it is submitted, if done by a stranger. On the other hand he cannot sue even a stranger for interfering with his use of a way across another's land, or with his practice of taking minerals from it, or of fishing in another's stream, unless he can show a legal right to do those acts.

The authorities on the whole matter are singularly scanty and unsatisfactory. The following cases may be referred to:—*Jeffries v. Williams* (1850) 5 Ex. 792; *Bibby v. Carter* (1859) 4 H. & N. 153; *Pullan v. Roughfort Bleaching Co.* (1887) 21 L.R. Ir. 73; *Nuttall v. Bracewell* (1866) L.R. 2 Ex. 1; *Whaley v. Laing* (1857) 2 H. & N. 476, 3 H. & N. 675, 901. (This case is so complicated with points of pleading and with special considerations touching the particular kind of servitude in question, *viz.*, riparian rights, that it cannot be regarded as a satisfactory authority upon the general question at all.) *Stockport Waterworks Co. v. Potter* (1864) 3 H. & C. 300; *Hill v. Tupper* (1863) 2 H. & C. 121. See also Smith's Leading Cases, I. 358-360, 11th ed. The question of the protection of *de facto* easements is closely connected with that of the right of action possessed by licensees, as to which, see *post* p. 232.

¹⁵ *Fitzgerald v. Firbank* (1897) 2 Ch. 96.

¹⁶ (1897) 2 Ch. 96.

¹⁷ *Ante*, p. 226.

§ 76.—Equitable Servitudes : Licenses.

Licenses defined.

1. A license is an agreement (not amounting to the grant of a legal easement or profit) that it shall be lawful for the licensee to enter upon the land of the licensor or to do some other act in relation thereto which would otherwise be illegal.

A license may be either to do something on the land of the licensor, or to do something on the land of the licensee himself. Examples of the former kind are an agreement for board and lodging (not amounting to a demise), the purchase of a ticket for a seat in a theatre, and an agreement for a right to place advertisements on another's land or buildings. Examples of the second kind of license are an agreement for liberty to obstruct an ancient window, or to let down the surface of the adjoining land by excavation, or to carry on some business which would otherwise amount to a nuisance.

A license may or may not be exclusive; *i.e.*, it may or may not confer a monopoly upon the licensee to do the act so permitted. In either case it may be granted either in perpetuity, or for a fixed period, or merely at the will of the licensor.

Licenses distinguished from easements and profits.

2. Nothing is to be classed as a license which amounts to a valid legal easement or profit, and there are at least three reasons which may prevent the existence of such an easement or profit, so as to reduce the right claimed to the level of a mere license or equitable servitude :

- (a) *An imperfect mode of creation.* A legal easement or profit must be created by deed; therefore a mere agreement not under seal can create merely a license or other equitable servitude.
- (b) *The absence of a dominant tenement.* Every legal easement must be appurtenant to a dominant tenement; therefore if a right is created (even by deed) which is merely in gross or personal, it amounts at the most (unless it is a profit, which does not require to be appurtenant) to a mere license or equitable servitude; *e.g.*, a grant even under seal of the right to put advertisements on the grantor's property.
- (c) *Rights of a kind not recognised at law.* We have seen that the class of legal easements is closed and incapable

of expansion by the addition of new forms at the will and caprice of a grantor. Therefore any right falling outside this class amounts at the most, even though appurtenant and created by deed, to a merely equitable servitude: the right, for example, to an uninterrupted view, or the right of privacy.¹

3. Since a license is not a legal servitude, it does not run with the servient land at law, so as to bind all subsequent owners of it. At law, indeed, it is a mere agreement, which binds no one save the grantor himself. Such an agreement, however, if of such a nature as to be specifically enforceable, amounts to a good equitable servitude; that is to say, it binds and runs with the land in equity, so as to be enforceable not merely against the grantor, but also against all subsequent owners and occupiers of the land except purchasers for value without notice of any such equitable right. License runs with the land in equity.

Thus in *Moreland v. Richardson*² a right of burial in a cemetery, acquired by agreement with the owners of the cemetery, was enforced by injunction against a subsequent mortgagee of the property, who had taken his mortgage with notice of the right in question. Such a right of burial is clearly not a legal easement, even though granted by deed, because it is in gross; yet it was held to constitute a good equitable servitude which ran with the land. So in *Hervey v. Smith*³ an agreement was made by two adjoining proprietors that one of them should have the right to discharge smoke into one of the chimneys in the wall of the other's house, and this agreement was enforced by injunction against a subsequent purchaser (with constructive notice) of the servient property. This was not a legal easement for want of a deed, but it was a good equitable servitude. In the case of the *Duke of Devonshire v. Eglin*⁴ the same principle was applied to a parol agreement for the right to have a watercourse upon the servient land⁵.

4. A licensee may protect his right to the exercise of Remedies of the license by an action in his own name for an injunction, if a licensee.

¹ *Supra*, p. 225.

² (1855) 25 L.J. Ch. 883.

³ (1856) 22 Beav. 299.

⁴ (1851) 14 Beav. 530.

⁵ For a license by way of an equitable profit, see *Lowe v. Adams* (1901) 2 Ch. 598—a purchase not under seal of a right of shooting.

the agreement is of such a nature that specific performance of it will be decreed in accordance with the rules of equity in that behalf; and an injunction may be so obtained against the licensor himself, or against any subsequent owner or occupier of the servient land except a purchaser for value without notice, or against a mere stranger.⁶

5. A licensee has an action for damages against the licensor for any disturbance of the license committed by him. For although a license does not confer any legal estate or interest in the land which is subject thereto, it nevertheless amounts to a valid contract between licensor and licensee, and is enforceable at law in the ordinary way of an action for damages for breach of contract.⁷

But since the licensee has no legal estate or interest in the servient land, he has, it would seem, no remedy at law against any subsequent owner or occupier or any stranger for a disturbance of his right. This was decided in the case of *Hill v. Tupper*,⁸ in which the plaintiff had acquired by grant under the seal of a canal company an exclusive right of keeping pleasure boats for hire upon the canal. He sued at law for damages a stranger who infringed this monopoly, and it was held that he had no such cause of action. "This grant," it is said,⁹ "merely operates as a license or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right."

This absence of a legal remedy by way of damages available by a licensee against a stranger is a very anomalous feature of our law. It seems curious that he who, by agreement with

⁶ *Duke of Devonshire v. Eglin* (1851) 14 Beav. 530; *Moreland v. Richardson* (1855) 25 L.J. Ch. 883; *Hervey v. Smith* (1856) 22 Beav. 299. Cf. *McManus v. Cooke* (1887) 35 Ch.D. 681, which, however, is a case of restrictive contract, not of license; but the same principle is applicable to each. That an injunction may be obtained against a mere stranger, not an assignee of the servient land, appears from *Mander v. Falcke* (1891) 2 Ch. 554.

⁷ *Kerrison v. Smith* (1897) 2 Q.B. 445; *Butler v. Manchester Rly. Co.* (1888) 21 Q.B.D. 207; *Wells v. Kingston-on-Hull* (1875) L.R. 10 C.P. 402; *Wilson v. Tavener* (1901) 1 Ch. 578; *Lowe v. Adams* (1901) 2 Ch. 598.

⁸ (1863) 2 H. & C. 121.

⁹ At p. 127.

the occupier of a building, has expended money in painting advertisements upon one of its walls, should have no legal remedy against a third person who wilfully defaces them. The whole law on this matter requires more consideration than it has yet received.¹⁰

§ 77.—The Rule in *Wood v. Leadbitter*.

1. A license, unless specifically enforceable, is revocable at will by the licensor, even though granted for a fixed term, and is therefore no justification for any act done in the exercise of it after revocation. But the premature revocation of a license is nevertheless a breach of contract, for which an action for damages may be brought against the licensor.

This is known as the rule in *Wood v. Leadbitter*.¹ In this case the plaintiff bought a ticket for admission to the stand of a racecourse, entitling him to remain there throughout the continuance of the races. In breach of the agreement thus entered into between him and the occupiers of the racecourse, they ordered him to leave the premises while the races were going on, and on his refusal to leave they ordered and procured his forcible expulsion by their servant, the defendant. An action of trespass for this assault was thereupon brought by him against the defendant, who pleaded that the plaintiff was a trespasser and had been ejected by order of the occupiers of the premises, to which plea the plaintiff replied that he was on the premises by the leave and license of the occupiers. On these pleadings and facts it was held by the Court of Ex-

Licenses
revocable at
will.

Wood v.
Leadbitter.

¹⁰ It has been suggested (Smith's Leading Cases, I. 359, 11th ed.) that there is at least one important class of licenses in which the rule in *Hill v. Tupper* has no application; viz., those in which the license is of such a nature that it would, if created by deed or prescription, amount to a legal easement or profit: e.g., a right of way or of light created by written agreement only. "It is submitted that wherever the right claimed is one which may by law be made the subject-matter of property, then enjoyment of such a right, though only under a license revocable by the grantor, is as against a wrongdoer a sufficient title to enable the licensee to maintain an action upon it." (See *supra*, p. 226, n. 14). It is also a question fit to be considered whether the power of courts of equity to grant an injunction to a licensee, taken in conjunction with its power to grant damages in lieu of an injunction, does not exclude the rule in *Hill v. Tupper* in all cases in which an injunction can be granted.

¹ (1845) 13 M. & W. 838; 67 R.R. 831.

chequer that the action would not lie. Although the license had been revoked improperly and in breach of contract, its revocation was none the less effectual. The license was terminated, and the plaintiff was a trespasser and could not sue in tort for his expulsion by order of the occupiers.

Damages for
premature
revocation.

2. It is to be noticed as to this case that the action was one of tort against the servant of the licensor, and not one for breach of contract against the licensor himself. It is now well settled that an action of this latter description will lie in such a case. He who is ejected from land by the licensor in breach of his license or is otherwise disturbed by the licensor in the exercise of it, has a good cause of action in contract.²

3. If, however, the licensee insists, notwithstanding the revocation of his license (even though it is thus premature and wrongful), in entering or remaining on the land or in otherwise exercising his license, he becomes thereby a trespasser or other wrongdoer, and is liable in an action accordingly at the suit of the licensor. The result is that in such a case both parties are in the wrong as well as in the right, and each of them can sue the other as well as be sued by him. The damages recoverable respectively in these cross actions will depend on the circumstances of the case. This rule is an illustration of the difference between a legal *power* to do a thing *effectively* and a legal *right* or *liberty* to do it *lawfully*. A licensor has the power to revoke the license at any time, but he has no right to revoke it until the expiration of the term.

License not
revocable if
specifically
enforceable.

4. Since the fusion of law and equity it may be assumed that the rule in *Wood v. Leadbitter* no longer applies to licenses which are of such a nature that they are specifically enforceable and therefore constitute equitable servitudes over the servient land. It would be difficult to hold that a licensee is a trespasser because of doing an act which the licensor may be compelled by injunction to allow him to do. If this is so, the old law now applies only to those cases in which a licensee is limited to an action for damages and has no claim to specific performance. As so restricted, the rule in

² *Kerrison v. Smith* (1897) 2 Q.B. 445, and the other cases cited, *supra*, p. 232. n. 7.

Wood v. Leadbitter would seem to be founded on good sense, and is not to be regarded as a mere technicality of the law. If a license is not fit to be specifically enforced, neither is it fit to be exercised in defiance of the will of the licensor; and the sole remedy of the licensee is and ought to be a claim for pecuniary compensation.³

5. Before the rule in *Wood v. Leadbitter* can take effect the licensee must be allowed a reasonable time in which to enter or remain on the land for the purpose of removing any property which he may have brought there in exercise of the license.⁴ Rights of licensee on revocation.

6. The premature revocation of a license imposes no obligation upon the licensee to do any act for the purpose of preventing the continuing effect upon the servient land of any act which he may have lawfully done before the revocation. For example, if a permanent license is given to obstruct an ancient window by building a house, the licensee on revocation is not bound to pull the house down.⁵

§ 78.—Equitable Servitudes : Restrictive Contracts.

1. A restrictive contract is an agreement between the owners of two pieces of land that one of them will refrain from doing on his land some act which he otherwise would have a right to do, and which touches and concerns the land of the other. Such an agreement creates an equitable servitude which runs with the servient land in equity, though not at law. The rule in *Tulk v. Moxhay*.

2. This rule—called the rule in *Tulk v. Moxhay*¹—pertains to the law of contracts rather than to that of torts, but it is so intimately connected with the law of easements, profits, and licenses, that it is necessary to mention it here for the sake of completeness. Just as a license is a permissive

³ See, however, the observations of Cozens-Hardy, J., in *Lowe v. Adams* (1901) 2 Ch. p. 600.

⁴ *Cornish v. Stubbs* (1870) L.R. 5 C.P. 334; *Mellor v. Watkins* (1874) L.R. 9 Q.B. 400.

⁵ *Liggins v. Inge* (1831) 7 Bing. 682; 33 R.R. 615.

¹ (1848) 2 Ph. 774.

contract allowing some act otherwise illegal to be done in relation to the land of another, so a restrictive contract prevents some act from being done in relation to the land of another which would otherwise be legal. Each kind of contract creates an equitable servitude which runs with and binds the land. The servitude created by a license or permissive contract corresponds in equity to a positive easement at law; while the servitude created by a restrictive contract corresponds to a negative easement at law. Thus an agreement not under seal allowing a beam of the grantee's house to rest upon the wall of the grantor's house is a license, and creates an equitable positive easement, corresponding to a legal easement of support. On the other hand, an agreement not under seal that the grantor will not obstruct the windows of the grantee's house is a restrictive contract, which creates an equitable negative easement corresponding to the legal easement of light.²

Restrictive contracts distinguished from easements.

3. There are at least two reasons which may prevent a restrictive contract from creating a valid negative easement at law :

- (a) It may not be under seal, and will in that case constitute an equitable servitude only.³
- (b) It may fall in respect of its contents outside the limited class of legal easements. Thus although a grant by deed of a right not to have the access of light to a window interrupted creates a good legal easement, a similar grant not to have the view from a window interrupted creates a merely equitable servitude.⁴

4. In order to constitute an equitable servitude in accordance with the rule in *Tulk v. Moxhay*, a contract must be purely negative or restrictive; it must not be an affirmative contract binding the servient owner to an act instead of to a mere non-feasance. A contract to build is purely personal; but a contract not to build may run with the land as an equitable

² *McManus v. Cooke* (1887) 35 Ch.D. 681.

³ *McManus v. Cooke* (1887) 35 Ch.D. 681.

⁴ *Leech v. Schweder* (1874) L.R. 9 Ch. 463

able servitude. An equitable servitude cannot impose a positive obligation, any more than a legal servitude can.⁵

5. A restrictive contract is enforceable by an action for damages against the contractor himself, and by an action for an injunction either against the contractor, or against any subsequent owner or occupier of the servient land except a purchaser for value without notice, or against a mere stranger.⁶

⁵ *Haywood v. Brunswick Building Society* (1881) 8 Q.B.D. 403 ; *London & S.W. Ry. Co. v. Gomm* (1881) 20 Ch.D. 562.

⁶ *Mander v. Falche* (1891) 2 Ch. 554. As to the running of such a contract with the dominant tenement, see *Rogers v. Hosegood* (1900) 2 Ch. 388.

CHAPTER IX.

INJURIES TO SERVITUDES—(*Continued.*)

In the preceding chapter we have dealt with servitudes in general, and it is now necessary to consider the law with regard to certain particular classes of them which are of sufficient importance to call for special examination. These are the following : (1) Rights of Support, (2) Rights of Light, (3) Rights of Water, and (4) Rights of Way.

§ 79.—The Right of Support.

Natural
easement of
support to
land.

1. Every piece of land has a natural easement of support from the adjoining land, and also from subjacent land when the surface and substratum belong to different persons.

2. This rule relates only to the support of land in its natural condition, *i.e.*, unburdened with buildings and unweakened by excavations. If additional support is needed because of any such alteration in the natural condition of the land, a right to it must be acquired by grant, prescription, or otherwise, and is not a natural incident of property.¹

3. The right of subjacent as opposed to lateral support comes into existence whenever the ownership of the surface becomes separated in any manner from that of the underlying strata : *e.g.*, when coal or other mineral is granted with a reservation of the surface. The right of support in such cases is natural, and not dependent on any express or implied grant or reservation, and therefore exists in whatever way the separation between surface and subsoil has come about.²

¹ *Dalton v. Angus* (1881) 6 A.C. 740 ; *Corporation of Birmingham v. Allen* (1877) 6 Ch.D. 284.

² *Humphries v. Brogden* (1850) 12 Q.B. 739 ; 76 R.R. 402.

4. In any case the natural right of lateral or subjacent support may be destroyed by its express surrender. Thus a grant of the right to take coal or other minerals may include permission to let down the surface. Whether the easement of support has or has not been thus surrendered is a question of construction, depending on the particular facts of the case; and in the absence of any expression or necessary implication of a contrary intent the easement continues to exist notwithstanding the grant of a right to extract minerals.³

5. A building has no natural easement of support either from the adjoining land or from other buildings. He who erects a building in such a fashion that it depends for support upon the adjoining land or building of another person does not thereby obtain any right to that support, and cannot complain of its withdrawal, even if the result is the destruction of his own building.⁴

6. It is possible that a building has no natural right even to subjacent support, but this has never been decided.⁵ The question is of little importance, because in all ordinary cases it is impossible to injure a building by the withdrawal of subjacent support without committing an actionable infringement of the natural right of support possessed by the land itself on which the building stands; and in such a case damages can be recovered for the building also.⁶

7. A right of support for a building can be acquired by express or implied grant or by open enjoyment for twenty years.⁷ Thus the owner of a house, who sells or lets it and reserves adjoining land for himself, does thereby impliedly grant an easement of support from that land. So also if land is sold for building purposes, or if two houses mutually dependent on each other become severed in ownership. So when the

³ *Davies v. Treharne* (1881) 6 A.C. 460; *Duke of Buccleuch v. Wakefield* (1869) L.R. 4 H.L. 377; *Love v. Bell* (1884) 9 A.C. 286; *Butterknowle Colliery Co. v. Bishop Auckland Co-operative Co.* (1906) A.C. p. 313.

⁴ *Partridge v. Scott* (1838) 3 M. & W. 220, 49 R.R. 578; *Union Lighterage v. London Graving Dock Co.* (1902) 2 Ch. 557; *Dalton v. Angus* (1881) 6 A.C. 740.

⁵ See *Rogers v. Taylor* (1858) 2 H. & N. 828. ⁶ *Infra*, § 80 (7).

⁷ *Dalton v. Angus* (1881) 6 A.C. 740; *Lemaître v. Davis* (1881) 19 Ch. D. 281.

upper storeys of a house become severed in ownership from the lower, there is an implied grant or reservation of a right of subjacent support. A full account of this matter, however, pertains to the law of property, and not to that of torts.⁸

§ 80.—Disturbance of the Right of Support.

Disturbance
of right of
support

1. It is an actionable wrong to withdraw the support to which land or buildings are entitled, and thereby wilfully or negligently to cause a subsidence of the land or structural injury to the buildings.

2. No action for damages lies until and unless actual subsidence or other damage has occurred. The wrong consists not in withdrawing the support which the dominant tenement is receiving, but in doing damage by means of such a withdrawal. The servient owner, therefore, is at liberty to pull down his house, or to excavate his land, or to extract minerals from it, so long as by artificial support or otherwise he does in fact prevent any harm accruing to the plaintiff; and the plaintiff, in the absence of any express grant to that effect, has no right to insist on retaining the particular mode or measure of support which he has in fact hitherto enjoyed. From this it follows that when, as often happens, there is an interval of time (it may be one of years) between the withdrawal of support and the accrual of damage, the statute of limitations runs from the later date and not from the earlier.¹ Probably the mere subsidence of land is in itself sufficient damage to found an action, even though no pecuniary loss can be shown to have resulted from it.²

3. The easement of support is completely predominant over the right of the servient owner to use his property; and if he cannot rebuild his house or extract his minerals, however

⁸ See *Grosvenor Hotel Co. v. Hamilton* (1894) 2 Q.B. 836; *Rigby v. Bennett* (1882) 21 Ch.D. 559; *Siddons v. Short* (1877) 2 C.P.D. 572; *Union Lighterage Co. v. London Graving Dock Co.* (1902) 2 Ch. 557; *Dalton v. Angus* (1881) 6 A.C. p. 792; *Humphries v. Brogden* (1850) 12 Q.B. p. 747.

¹ *Backhouse v. Bonomi* (1861) 9 H.L.C. 503.

² *Att.-Gen. v. Conduit Colliery Co.* (1895) 1 Q.B. p. 311; *Mitchell v. Darley Main Colliery Co.* (1884) 14 Q.B.D. p. 137. See, however, *Smith v. Thackeray* (1866) L.R. 1 C.P. 564, to the contrary.

carefully or skilfully, without doing damage to the dominant tenement, he is not at liberty to perform these operations at all.³ On the other hand the servient owner is liable solely for misfeasance, and not for the mere non-feasance of failing to keep the servient building in repair.⁴

4. There is no sufficient reason for supposing that the infringement of a right of support is any exception to the general principle that liability for a tort depends on the existence of wrongful intent or culpable negligence. Damage due to inevitable accident is in this case as in most others no sufficient ground of responsibility. In *Hughes v. Perceval*⁵ Lord Blackburn, speaking of the defendant's duty in carrying out structural alterations which involved interference with a party-wall, says: "I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it; but I think that the duty went as far as to require him to see that reasonable skill and care were exercised."⁶ It is true that in most of such cases *res ipsa loquitur*, and the mere fact that damage has been actually done is sufficient proof that due care and skill were not devoted to the avoidance of it. But in exceptional cases this is not so; as when temporary support afforded to a house during the rebuilding of adjoining premises is destroyed by fire, earthquake, or other inevitable accident; and in such cases it is submitted that the servient owner is under no liability for the resulting damage.⁷

³ *Hext v. Gill* (1872) 7 Ch. 699; *Humphries v. Brogden* (1850) 12 Q.B. p. 745.

⁴ *Colebeck v. Girdlers' Co* (1876) 1 Q.B.D. 234.

⁵ (1883) 8 A.C. p. 446.

⁶ Lord Fitzgerald at p. 455 expresses a similar opinion.

⁷ It is true, indeed, that there are *dicta* in certain cases to the effect that no amount of care or skill will excuse a defendant who does harm by withdrawing support from his neighbour. See *Brown v. Robins* (1859) 4 H. & N. p. 193; *Hunt v. Peake* (1860) 29 L.J. Ch. p. 787. These *dicta*, however, must be understood as meaning merely that it is no defence that the building or mining operations of the defendant were in themselves carefully and skilfully performed, if, having regard to the danger thereby incurred by the plaintiff, it was a negligent act to undertake them at all. If the servient owner cannot mine or rebuild, howsoever carefully, without interfering with the right of support, he must not do these things at all.

5. Nevertheless an occupier of land, or any other person, who authorises or procures anything to be done which is of such a nature that, if not done with due care, it will interfere with an easement of support, is vicariously liable for any negligence in the doing of it, even though it is done by an independent contractor and not by a servant. It has been held in several cases that the authorisation of any withdrawal of support is an exception to the general rule that a principal, though liable for the negligence of his servant, is not liable for that of an independent contractor. Therefore, if a servient owner employs a contractor to pull down his house, and the contractor is guilty of negligence in doing so, whereby damage accrues to the dominant tenement, the servient owner is responsible for it, as well as the contractor himself.⁸ If the negligence is that of a sub-contractor, all three will be equally and jointly responsible.

No right to support from underground water.

6. It is not actionable to cause a subsidence of land or structural injury to buildings by the withdrawal of the support of underground water by draining, pumping, or otherwise, unless a right to such support has been acquired by express or implied grant. The natural right to the lateral or subjacent support of other land does not extend to the support of underground water.⁹ It need not be doubted, however, that a right to the support of such water may be obtained by express or implied grant; so that, for example, he who sells a house dependent for its stability on subjacent water may in certain circumstances be precluded by his own implied grant from so dealing with adjoining land as to destroy this support. Quick-sand, running silt, and other semi-fluid substances are to be deemed land and not water within the meaning of this rule, and any withdrawal of the support afforded by them is actionable.¹⁰

⁸ *Bower v. Peate* (1876) 1 Q.B.D. 321; *Hughes v. Perceval* (1883) 8 A.C. 443; *Dalton v. Angus* (1881) 6 A.C. 740; *Lemaitre v. Davis* (1881) 19 Ch.D. 281.

⁹ *Popplewell v. Hodgkinson* (1869) L.R. 4 Ex. 248. This seems to be simply a logical extension of *Chasemore v. Richards* (1859) 7 H.L.C. 349.

¹⁰ *Jordeson v. Sutton Gas Co.* (1899) 2 Ch. 217; *Trinidad Asphalt Co. v. Ambard* (1899) 2 Ch. 260 n. In *Jordeson's Case* at p. 239, Lindley, M.R., expresses doubts as to the principle of *Popplewell v.*

7. Even when no easement of support has been acquired by a building, the damages recoverable in an action for causing the subsidence of the land itself will include any consequential damage to the building, unless the subsidence has been caused by the additional pressure of the building.¹¹ Measure of damages.

8. Although, as against the lawful owner or occupier of the adjoining land, he who complains that he has suffered damage through the withdrawal of support must prove that he has a lawful easement of support, nevertheless as against a mere stranger no such proof is requisite. The mere *de facto* enjoyment of support is a sufficient title *adversus extraneos*.¹² This rule is analogous to the rule that the mere possession of land or chattels amounts to a valid title of ownership as against those who cannot show a better title in themselves. Disturbance of *de facto* support.

9. Notwithstanding certain older *dicta* to the contrary, it may be taken as established law that in the absence of any lawfully acquired easement of support the owner or occupier of land, as opposed to a mere stranger, is under no liability for causing subsidence or structural damage by withdrawing the support which the adjoining land or buildings *de facto* receive, and that this is so even though the damage is done wilfully or negligently. In *Dalton v. Angus*¹³ Lord Penzance says: "It is the law, I believe I may say without question, that at any time within twenty years after the house is built, the owner of the adjacent soil may with perfect legality dig that soil away and allow his neighbour's house, if supported by it, to fall in ruins to the ground."¹⁴

Hodkinson L.R. 4 Ex. 248, but as this was the unanimous decision of the Exchequer Chamber, these doubts must be taken to relate to the true extent of the principle (*e.g.*, its exclusion by implied grant), and not to the correctness of the decision itself.

¹¹ *Brown v. Robins* (1859) 4 H. & N. 186; *Stroyan v. Knowles* (1861) 6 H. & N. 454.

¹² *Jeffries v. Williams* (1850) 5 Ex. 792; *Bibby v. Carter* (1859) 4 H. & N. 153. See *supra*, p. 226, n. 14.

¹³ (1881) 6 A.C. p. 804.

¹⁴ See also *Wyatt v. Harrison* (1832) 3 B. & Ad. 871, 37 R.R. 566; *Peyton v. Mayor of London* (1829) 9 B. & C. 725, 33 R.R. 311; *Gayford v. Nichols* (1854) 9 Ex. 702. In *Trower v. Chadwick* (1836) 3 Bing. N.C. 334, 43 R.R. 659; however, the point was left open by the Court of Exchequer Chamber.

§ 81.—The Right to Light.

Acquisition
of an
easement of
light.

1. The right to receive light across another's land is not a natural incident of property, but an acquired easement, and until it has been acquired in the manner of other easements, no amount or mode of obstruction is actionable. The right may be acquired not merely by express or implied grant, but also by prescription, twenty years' continuous enjoyment of light conferring a title to it under the Prescription Act.¹ The easement so acquired is commonly termed a right of ancient lights. It is difficult to see on what rational principle any such form of prescriptive acquisition can be based, and it is a matter for regret that it has succeeded in obtaining legal recognition.

2. The right to light cannot be acquired by prescription save in respect of a building. No length of enjoyment can confer any right to the access of light to open ground (*e.g.*, a garden) or to any structure which is not a building.² Presumably the same limitation exists in the case of a grant; so that the grant of a right to the access of light otherwise than to a building would not create any legal easement, but would amount at the most to a restrictive covenant running with the servient land in equity.

Disturbance
of right to
light.

3. When an easement of light has been acquired, it is an actionable wrong to erect or keep any building or other structure or thing on the servient land which so far obstructs the access of light as to render the dominant building uncomfortable or inconvenient for habitation or for any other ordinary purpose for which such a building is adapted. An ordinary purpose is one which does not require an extraordinary or exceptional quantity of light.

Colls
v. Home and
Colonial
Stores.

The rule as here stated is established by the leading case of *Colls v. Home and Colonial Stores*,³ which finally settled the law as to the extent of the right to light. "According to both principle and authority," says Lord Davey in this case,⁴ "I am of opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his

¹ 2 & 3 Wm. IV. c. 71. s. 3.

² *Harris v. De Pinna* (1885) 33 Ch.D. 238.

³ (1904) A.C. 179.

⁴ *Ibid.*, p. 204.

ancient windows of a quantity of light the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind." So according to Lord Lindley :⁵ " An owner of ancient lights is entitled to sufficient light, according to the ordinary notions of mankind, for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, a shop, or other place of business."

4. This being so, there is an obvious analogy between the disturbance of the easement of light and a nuisance affecting comfort and convenience. It is not true that such a disturbance is indeed a nuisance—save in that vague sense in which nuisance includes not only nuisances properly so called, but also all disturbances of servitudes appurtenant. A nuisance in the proper sense consists, as we have seen,⁶ in the escape from the land of the defendant into that of the plaintiff of some deleterious thing, such as noise, smoke, or smells. If darkness could be classed among such things, then an obstruction of light would be a true nuisance ; but it is clear that the claim of the owner of ancient lights is a claim to receive a benefit from the neighbouring land, and not a claim to be free from its detrimental influences. Nevertheless though the obstruction of light is no true nuisance, the test of its actionable nature is the same as if it were, *viz.* its effect on the comfortable and convenient occupation of the property for ordinary purposes, as judged by the standard of ordinary people.

5. The effect of an obstructing building upon the lights of the dominant building depends on the following considerations :—

Circumstances affecting liability.

- (a) The amount of light formerly received ;
- (b) The use to which the dominant building is put, or is capable of being put ;
- (c) The size and number of the obstructed windows and the extent of the space to be lighted by them ;
- (d) The existence of other windows not obstructed ;
- (e) The height and proximity of the obstructing building, *i.e.*, the angle of obstruction.

⁵ *Ibid.*, p. 208.

⁶ *Supra*, p. 180.

We proceed to consider how far, if at all, each of these considerations is relevant in determining whether an actionable obstruction exists.

Amount of
light former-
ly received.

6. *Amount of light formerly received.* The dominant building is not necessarily entitled to the whole of the light which it has hitherto received, and even a substantial diminution of this light is not actionable unless it is so great as to produce the effect already defined. Before the decision of the House of Lords in *Colls v. Home and Colonial Stores*⁷ it was supposed to be the law that the measure of the right to light was not the amount required for comfortable and convenient habitation and use, but the amount actually received, even though in excess of any such requirement; and that any substantial and sensible diminution was therefore actionable.⁸ This doctrine may now be taken to have been definitely overruled by *Colls' Case*. The test of an actionable obstruction is not whether a dwelling-house, for example, has been made less bright, cheerful, or desirable than it was before, but whether it has been made uncomfortable according to the standard of ordinary men. Any light received beyond this standard is a surplus luxury for which the law affords the householder no protection at the expense of his neighbours. "In ordinary cases," says Lord Lindley,⁹ "a person does not necessarily acquire a right to enjoy in future all the light he has had for twenty years. He may have had more than was reasonably required either for domestic or business purposes; and in that case his right to protection is limited to the amount of light reasonably required."¹⁰

⁷ (1904) A.C. 179.

⁸ *Warren v. Brown* (1902) 1 K.B. 15.

⁹ *Colls v. Home and Colonial Stores* (1904) A.C. p. 206.

¹⁰ It is submitted that this is a correct statement of the law notwithstanding the later and very unsatisfactory case of *Jolly v. Kine* (1907) A.C. 1, in which the House of Lords was equally divided and therefore upheld the decision of the majority of the Court of Appeal in favour of the plaintiff. (1905) 1 Ch. 480. The only mode of reconciling this decision with the accepted principle of *Colls v. Home and Colonial Stores* is to regard *Jolly v. Kine* as a decision on the particular facts of the case to the effect that the diminution of light did in fact amount to a nuisance in a *locality of that nature*, the standard of comfortable living being there exceptionally high. See the observations of Lord Loreburn at p. 3, and see p. 185 *supra*. Whether on the facts such

7. *The use made of the dominant building.* The use which the plaintiff has actually made or actually intends to make of the building is irrelevant in determining whether the obstruction of light is actionable. The true test is the ordinary uses of which such a building is capable. The amount of light to which a building is entitled is the amount reasonably required for any ordinary purpose to which the building in its present structural form may reasonably be put. Ordinary purposes are those which do not require any exceptional or extraordinary quantity of light. This being so, the plaintiff does not lose or restrict his right by not making full use of it. He may for twenty years have used a room in his house as a lumber room, or not have used it at all, and yet he may sue for any obstruction which would prevent its comfortable occupation. On the other hand, he cannot increase his right by using his building for a purpose which requires more than the ordinary quantity of light, e.g., for a photographic studio; and this is so, even though the building has been put to that use for the full period of twenty years with the knowledge of the owner of the servient land.¹¹

"Regard may be had," says Lord Davey in *Colls' Case*,¹² "not only to the present use, but also to any ordinary uses to which the tenement is adapted. . . It is agreed on all hands that a man does not lose or restrict his right to light by non-user of his ancient lights, or by not using the full measure of light which the law permits. . . The question for what purpose he has thought fit to use that light . . . does not affect the question. The actual user will neither increase nor diminish the right." So Lord Lindley says:¹³ "The purpose for which a person may desire to use a particular room or building in future does not either enlarge or diminish the easement which he has acquired."

a conclusion was justified is another question, on which it is difficult to avoid concurring with the dissenting judgments of Lord Robertson and Lord Atkinson. The reasoning of the majority of the Court of Appeal seems to involve nothing less than a recurrence to the overruled doctrine of *Warren v. Brown* (1902) 1 K.B. 15.

¹¹ *Ambler v. Gordon* (1905) 1 K.B. 417. In *Colls' case* the question as to the effect of prescription is left open by Lord Davey (1904) A.C. p. 203.

¹² (1904) A.C. pp. 202, 204

¹³ *Ibid.*, p. 211.

Structural
arrangement
of building.

8. *Structural arrangement of the dominant building.* It is, it seems, no defence that the plaintiff's building is structurally defective in the matter of lighting, and that had the windows been large enough or numerous enough, no inconvenience would have been suffered by him. It is clear that the effect of an obstructing building will be the greater, the worse the lighting arrangements of the dominant building are, and that an erection may cause serious inconvenience in a building already badly lighted, which would have no such effect on a well lighted one. It would seem, however, that such a consideration is irrelevant. The plaintiff has a right to the comfortable and convenient occupation of his building as it stands, and if it is badly lighted, the defendant must take all the more care not to obstruct such light as it possesses, or else not to allow an easement of light to be acquired. Thus in *Dent v. Auction Mart Co.*¹⁴ it is said in answer to such a defence: "I apprehend it is not for the defendants to tell the plaintiffs how they are to construct their house, and to say 'You can avoid this injury by doing something for which you would have no protection.' . . . They have a right already acquired by their old existing window; that right they wish to preserve intact; and I think they are clearly entitled to retain the right as they acquired it, without being compelled to make any alterations in their house to enable other people to deal with their property."

A structural alteration made in the dominant building cannot increase the amount of light to which the building is entitled. The plaintiff cannot by diminishing the size of his windows, or by blocking up one of them, forthwith increase the burden on the servient land. He must acquire an increased right by twenty years' enjoyment from the date of such an alteration. So also, if without altering the windows, he increases the size of the room lit by them, so as to require more light; or if he alters the structure of the building, so as to make it fit for a purpose for which it was not formerly adapted, and which requires an increased flow of light. Thus in *Martin v. Goble*¹⁵ an ancient malt-house was by structural

¹⁴ (1866) L.R. 2 Eq. p. 251. See, however, the observation of Lord Robertson in *Colls' Case* (1904) A.C. p. 181.

¹⁵ (1808) 1 Camp. 320.

alterations transformed into a workhouse, and it was held that the building was entitled to the amount of light necessary for a malt-house but not to that which was necessary for a workhouse. "The converting it from the one into the other," says McDonald, C.B.,¹⁶ "could not affect the rights of the owners of the adjoining ground. No man could by any act of his suddenly impose a new restriction upon his neighbour." So in *Colls v. Home and Colonial Stores*¹⁷ the plaintiffs had, less than twenty years before, altered the structure of their building by enlarging the room lit by their ancient windows, and it was held that they had no cause of action simply because they were deprived of sufficient light to light the whole of the room so enlarged. "It would be contrary to the principles of the law relating to easements," says Lord Davey,¹⁸ "that the burden of the servient tenement should be increased or varied from time to time at the will of the owner of the dominant tenement. The easement is for access of light to the building, . . . and it does not seem to me to depend on the use which is made of the chambers in it, or to be varied by any alterations which may be made in the internal structure of it."

9. *Residuary light from other windows.* In estimating the actionable nature of any obstruction of light, no account is to be taken of any residuary light entering through other windows in respect of which no legal protection exists and which are capable of obstruction by third persons. The plaintiff cannot be deprived of his right to complain of an obstruction of his ancient lights, merely because of the irrelevant circumstance that he has at present the precarious enjoyment, at the will of another person, of sufficient light through other windows. "I apprehend," says Lord Lindley in *Colls' Case*,¹⁹ "that light to which a right has not been acquired by grant or prescription, and of which the plaintiff may be deprived at any time, ought not to be taken into account."²⁰

As to residuary light of other kinds, the law remains unsettled, and the true solution is probably one of considerable

¹⁶ *Ibid.*, p. 322.

¹⁷ (1904) A.C. 179.

¹⁸ *Ibid.*, p. 202.

¹⁹ (1904) A.C. p. 211.

²⁰ See also *Jolly v. Kine* (1907) A.C. p. 7, *per* Lord Atkinson.

complexity. It may be necessary to distinguish between residuary light coming over the same servient land, residuary light coming over different servient land, and residuary light coming over the dominant land itself.

When there is any residuary light of such a nature that no account is to be taken of it, the question as to the actionable nature of the obstruction may be formulated thus: If this residuary light did not exist, would the obstruction complained of make the building uncomfortable or inconvenient, or more uncomfortable or inconvenient than it would otherwise have been?

The angle of obstruction.

10. *The angle of obstruction.* The actionable nature of any obstruction will depend *inter alia* on the angle of obstruction; that is to say, the angle between a horizontal line and a line drawn from the window to the top of the obstructing building. In an ordinary case the fact that this angle does not exceed 45 degrees is *prima facie* proof that the obstruction is not actionable.

If, indeed, the height and proximity of the obstructing building (*i.e.*, the angle of obstruction) were the only consideration, the law would be very much simplified, for it would be possible to lay down a hard and fast rule: *e.g.*, that the angle of obstruction may amount to 45 degrees, but must not exceed that limit. This, however, is not so, for there are, as we have seen, several other circumstances to be taken into account which may either increase or diminish the permissible angle. All that can be said, therefore, is that in ordinary cases an angle of 45 degrees may be presumed not to be excessive.²¹

§ 82.—The Right to Air.

Acquired right to the passage of air.

1. An easement of the passage of air through a defined aperture in a building may be acquired by grant, express or implied, or by prescription. Thus in *Bass v. Gregory*¹ the plaintiff was held entitled by prescription to the access of air to his cellar through a shaft which opened into a disused well

²¹ See *Colls v. Home & Colonial Stores* (1904) A.C. pp. 204, 210; *City of London Brewery Co. v. Tennant* (1873) L.R. 9 Ch. p. 220, *per* Lord Selborne.

¹ (1890) 25 Q.B.D. 481.

on the defendant's property. So in *Hall v. Lichfield Brewery Co.*² a claim was allowed to the access of air to a slaughter-house through two apertures made in the adjoining wall belonging to the neighbouring owner.

2. No prescriptive right, however, can be acquired to the access of air to open ground, or otherwise than to defined apertures in a building. Thus in *Webb v. Bird*³ it was held that no action would lie for the obstruction of the passage of wind to an ancient windmill. So in *Bryant v. Lefever*⁴ an action was unsuccessfully brought by a plaintiff on the ground that his ancient chimneys had been caused to smoke by reason of the erection of a building which cut off from them the necessary draught of air.⁵

§ 83.—Rights to Water.

There is a natural easement vested in every owner of land on the banks of a natural stream, entitling him to the continued flow of that stream in its natural condition. *Aqua currit et currere debet.* An actionable interference with this easement may take place in at least three different ways: Classes of water rights.

- (1) Abstraction: that is, taking water out of the stream so as to reduce the amount or level of the water as it flows past the plaintiff's land.
- (2) Pollution: that is, some harmful alteration of the natural quality of the water.
- (3) Obstruction: that is, the erection of some barrier against the natural flow of the water, so as to throw it upon the plaintiff's land higher up the stream or on the opposite side of it.

§ 84.—Wrongful Abstraction of Water.

1. Every riparian owner has a right to the undiminished flow of the water in a natural stream, subject only to the reasonable use of the water by other riparian owners for the purposes of their riparian property. The right to continued flow of water.

² (1880) 49 L.J. Ch. 655.

³ (1863) 13 C.B. (N.S.) 841.

⁴ (1879) 4 C.P.D. 172.

⁵ See also *Harris v. De Pinna* (1885) 33 Ch.D. 238; *Chastley v. Ackland* (1895) 2 Ch. 389, (1897) A.C. 155.

Who are
riparian owners.

2. A riparian owner is the owner or occupier of riparian land,¹ and riparian land is that which abuts on or is in contact with the water of a natural stream. The ownership of the land forming the bed of the stream is immaterial with respect to riparian rights. The bed or *alveus* may belong wholly to the riparian owner, as when the stream passes through his property; or it may belong in equal shares to the riparian owners on the opposite banks, as is *prima facie* the case when a stream forms the boundary between two properties; or it may belong wholly to the opposite riparian owner or to the Crown. Yet in all these cases the rights of the riparian owner are the same, for they are based on the ownership of the land which is in contact with the water so as to give a right of access to it, and not on the ownership of the land over which the water flows.²

3. Riparian rights are attached to riparian land only so long as it remains riparian. Therefore if riparian property becomes divided between two owners, so that one portion no longer adjoins the stream, that portion no longer retains any riparian rights.³ Conversely land which adjoins riparian land may become itself riparian by becoming united therewith in ownership.

4. Riparian rights belong to lower riparian owners even as against him on whose land the stream has its origin. A landowner on whose property a spring rises, which flows out of it in a natural stream, has no more right to intercept that water than if it were passing through his land from elsewhere.⁴

No natural
easement
over artificial
streams.

5. This right to the uninterrupted flow of water exists naturally only in the case of natural streams. Easements over artificial watercourses must be acquired by grant or

¹ Although it is convenient to speak in this connection of riparian owners, it would be more correct to speak of riparian occupiers. Here as elsewhere in respect of injuries to property, the right of action depends in ordinary cases not on the ownership but on the possession of the property affected. The right of an owner who is not in possession is exceptional, and will be considered later.

² *Lyon v. Fishmongers Co.* (1876) 1 A.C. 662.

³ See *Stockport Waterworks Co. v. Potter* (1864) 3 H. & C. 300.

⁴ *Dudden v. Clutton Union* (1857) 1 H. & N. 627; *Bunting v. Hicks* (1894) 70 L.T. 455; *Mostyn v. Atherton* (1899) 2 Ch. 361.

prescription.⁵ The nature of such acquired rights will depend on the circumstances in which they have come into existence, and they may or may not be identical with the rights which exist in respect of natural streams.⁶

6. There is no natural right to the continued flow of mere surface water not running in any defined natural channel, for such water does not constitute a stream within the meaning of the rule now under consideration. Therefore the owner of land on which such water exists, *e.g.*, a spring which spreads its supply over the surrounding land instead of directly feeding a natural stream, may by drainage or otherwise abstract or intercept it, without doing wrong to landowners on a lower level who may have received the benefit of such a supply. And this is so even though the surface water would otherwise find its way ultimately into a natural stream, which is consequently diminished by the defendant's operations. But after it has once reached a natural stream, or a natural pond or pool which directly feeds a natural stream, it must not be abstracted.⁷

No natural right to the flow of surface water not amounting to a stream.

7. The general principle now under consideration has been established by our law after some hesitation, as the most satisfactory solution of the very difficult problem created by the competing and inconsistent interests of upper and lower riparian owners. It may not be useless to notice briefly the various alternative principles which might have been adopted in this matter.

Alternative principles as to riparian rights.

(a) The law might have regarded the interests of the upper owners as completely predominant over those of the lower; so that the former could make such use of the water

⁵ *Wood v. Waud* (1848) 3 Ex. 748, 77 R.R. 809; *Rameshur v. Koonj* (1878) 4 A.C. 121.

⁶ See *Baily v. Morland* (1902) 1 Ch. 649; *Sutcliffe v. Booth* (1863) 32 L.J. Q.B. 136. It will be understood that notwithstanding this distinction between natural and artificial streams, the riparian rights of an owner on the bank of a natural stream will suffice to protect his enjoyment for riparian purposes of water in an artificial channel, such as a mill-race, by which he diverts water from the natural stream. See for example *Nuttall v. Bracewell* (1866) L.R. 2 Ex. 1.

⁷ *Rawstron v. Taylor* (1855) 11 Ex. 369; *Broadbent v. Ramsbotham* (1856) 11 Ex. 602.

passing through their lands as they pleased, and the latter would have a right to no water save the residue which the upper owners in their own good pleasure chose to leave to them.

(b) In the second place, the exactly opposite principle might have been adopted, making the interests of the lower owners absolutely predominant over those of the upper. any abstraction whatever being an infringement of the rights of all those who owned land lower down the stream.

(c) A third possible alternative is a compromise between these two extremes, and makes riparian rights depend on prior appropriation. On this principle he would have the best right who first made use of the water for some beneficial purpose, and all subsequent user by other owners higher or lower would be subject to this acquired right. At one time it was believed that this was actually the law, but this doctrine was definitely rejected in the leading case of *Mason v. Hill*,⁸ which first established the law of riparian rights on its modern basis.

(d) The fourth and last alternative is that which has been actually adopted. It also, like the third, is a compromise between the two extreme principles already stated, but it is a compromise of a different nature. The lower owners have a right to the undiminished flow of the water as against the upper owners, but it is not an absolute right, for it is subject to the reasonable use of the water by the upper owners for the purposes of their riparian lands. "This right," says Parke, B., delivering the judgment of the Court of Exchequer in *Embrey v. Owen*,⁹ "to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state; if it were, the argument of the learned counsel that every abstraction of it would give a cause of action would be irrefragable; but it is a right only to the flow of the water and the enjoyment of it subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. It is only, therefore, for an unreasonable and

⁸ (1833) 5 B. & Ad. 1; 39 R.R. 354.

⁹ (1851) 6 Ex. p. 369.

unauthorised use of this common benefit that an action will lie."

The precise nature of the general principle thus adopted has not yet been sufficiently worked out to be wholly free from doubt and difficulty, but it is believed that the two next succeeding sections state with approximate accuracy the present law on the subject.

§ 85.—Abstraction for Non-Riparian Uses.

1. Any interference with the flow of a natural stream, whether by a riparian owner or by any other person, through the abstraction of water for any purpose unconnected with the use of riparian land, is a wrong actionable at the suit of any riparian owner whose portion of the stream is thus affected, even though he suffers no damage.

All abstraction for non-riparian purposes actionable without proof of damage.

No upper riparian owner is at liberty to abstract water for other uses than those of his riparian property. As against non-riparian uses the right of the lower owners to the uninterrupted flow of the stream is absolute and unlimited.

A fortiori any such use of the water by a mere stranger, even with the leave and licence of a riparian owner, is actionable at the suit of all proprietors further down the stream. Nor is it necessary in any case of non-riparian use, whether by a riparian owner or a stranger, to prove that any damage has been suffered by reason of it; nor can any question arise as to whether such use is in the circumstances reasonable or unreasonable.

Thus in *Swindon Waterworks Co. v. Wilts Canal Co.*¹ the defendants were restrained by injunction from taking water from a stream for the purpose of supplying the wants of a neighbouring town, although no proof was offered that the plaintiffs or any other riparian owners suffered or would suffer any harm thereby. They had an absolute right to prevent abstraction for non-riparian purposes.

On the same principle in *McCartney v. Londonderry Rly. Co.*² it was held by the House of Lords that a railway company

¹ (1875) L.R. 7 H.L. 697.

² (1904) A.C. 301.

had no right to abstract water from a stream for the purpose of supplying the boilers of their locomotive engines, this being a non-riparian use and therefore actionable without proof of damage. So also in *Roberts v. Gwyfrai District Council*³ the Court of Appeal granted to a mill-owner an injunction against any withdrawal of water from a stream for the water-supply of a neighbouring village, although no damage was suffered or likely to be suffered by the plaintiff.⁴

The result is that since all such schemes of diversion for non-riparian use are actionable at common law, they can be effectually carried out only under the sanction of special statutory authority.

Aliter with use not amounting to abstraction.

2. Mere non-riparian use, however, which is unaccompanied by any permanent *abstraction*, and so causes no diminution of the stream as it flows past the plaintiff's land, is not actionable, whether he who so uses it is an upper riparian owner or a stranger with the leave and licence of such an owner. Thus in *Kensit v. Great Eastern Rly. Co.*⁵ the defendant, a non-riparian owner, took water by means of a pipe from a stream with the permission of a riparian owner, and after using it for manufacturing purposes returned it to the stream at a point above the plaintiff's land, undiminished in quantity and unaltered in quality. It was held by the Court of Appeal that no action lay for such a use.

What are riparian uses.

3. What then are to be accounted riparian uses within the meaning of this rule? Apparently we may say that all uses are riparian in which the water is consumed on the riparian land, and that all uses are non-riparian in which the water is taken away from the riparian land to be applied for any purpose elsewhere. Riparian use will therefore include the use of water for the domestic needs of those who live on the riparian property, for the watering of cattle, for the irrigation of crops, and for any manufacture carried on there.

What is riparian land.

4. What then shall be accounted riparian land for this purpose? We cannot say simply that it is the whole of any

³ (1899) 2 Ch. 608.

⁴ *Ormerod v. Todmorden Mill Co.* (1883) 11 Q.B.D. 155, is a similar decision.

⁵ (1884) 27 Ch.D. 122

piece of land which at any point touches the stream. For if this were so, the whole of a railway line 200 miles in length would possess riparian rights over every stream that it crossed ; and on the same principle an estate might be made riparian so as possess riparian rights through its whole extent, by the purchase of a strip of land a foot wide leading from it to a natural stream. As is shown in the already cited case of *McCartney v. Londonderry Rly. Co.*⁶ this is not the case, for if it were so, the use of water for consumption in the railway company's engines would have been a riparian use and therefore lawful if reasonable in amount. In the absence of any authoritative definition of the extent of riparian land, we may suggest that the term includes only that land which is substantially adjacent to the stream, and not that which is so remote from it that it would not in ordinary speech be said to lie on its banks, even though at one point it may be connected with the stream.

5. A right of non-riparian user may be acquired by a Prescriptive riparian owner by prescription or grant. How far, if at all, such rights can be acquired by a stranger, we shall consider later.

; 86.—Abstraction for Riparian Uses.

1. (a) If any riparian owner makes any unreasonable use of the water even for the purposes of his riparian land, he commits a wrong actionable at the suit of any other riparian owner affected thereby. Abstraction for riparian uses actionable if unreasonable.
- (b) Whether a use is reasonable depends partly on its nature and partly on its extent.
- (c) No use of water for its ordinary and primary purposes, viz., for drinking and domestic needs, is unreasonable, whatever its effect may be on the interests of the lower riparian owners.
- (d) Every use of water otherwise than for its ordinary or primary purposes is unreasonable and therefore action-

⁶ (1904) A.C. 301. The question is referred to in the judgment of Lord Macnaghten, p. 311.

able, if it interferes in any degree with the actual use of the water for riparian purposes by any other riparian owner.

Miner
v. Gilmour.

2. In *Miner v. Gilmour*¹ the law on this point is laid down by Lord Kingsdown as follows: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But further he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury,"

McCartney v.
Londonderry
Rly. Co.

So in *McCartney v. Londonderry Rly. Co.*² Lord Macnaghten says: "There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes,—sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all. . . . In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether.

¹ (1858) 12 Moore P.C. p. 156.

² (1904) A.C. p. 306.

No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."

3. This distinction between the ordinary and extra-ordinary use of water appears for the first time in the judgment of Lord Kingsdown in the above cited case of *Miner v. Gilmour*,³ and no authority is there cited for it. It seems never to have been acted on in any reported case, but it has been so consistently approved in subsequent judicial *dicta* that it may be taken to have obtained a secure place in the law.⁴ The ordinary use of water includes the drinking of it by men and beasts living on the riparian land, and also all other use of it for domestic needs; but the better opinion is that all other uses than these are to be classed as extraordinary.⁵ The distinction is of practical importance only in the case of very small streams, and it is acceptable in principle as saving the right of the upper owners to use such streams for the necessities of life, unrestricted by the competing claims of lower owners to use them for other and less essential riparian purposes.

4. The reasonableness of any secondary or extraordinary use of water seems to depend solely on its effect on the interests of other riparian owners. Every such use is unreasonable and actionable, which does actual damage to a lower owner by

Extraordinary use unreasonable if damage caused.

³ (1858) 12 Moore P.C. 131.

⁴ See *Swindon Waterworks Co. v. Wilts Canal Co.* (1875) L.R. 7 H.L. p. 704; *Wood v. Waud* (1849) 3 Ex. p. 781; *Baily v. Morland* (1902) 1 Ch. p. 663.

⁵ In *Ormerod v. Todmorden Mill Co.* (1883) 11 Q.B.D. p. 168, Brett, M.R., suggests that in a manufacturing district the consumption of water for manufacturing purposes may be deemed one of the ordinary or primary uses, but this suggestion has no support in any decision or even *dictum*, and is, it is submitted, unsound. No local custom not amounting to prescriptive right can so derogate from the common law.

preventing him from using the water for riparian purposes as beneficially as before, and no riparian use is unreasonable or actionable unless it actually causes such damage.

Thus in *Baily v. Morland*⁶ the defendants abstracted water for manufacturing purposes, and the plaintiffs, mill-owners using water-power lower down the stream, brought an action for an injunction. It was held by the Court of Appeal that in the absence of any proof that the plaintiffs suffered actual damage in respect of the working of their mill, they had no cause of action. "The defendants' right to use the water," says Stirling, L.J.,⁷ "is limited by this, that they must not so use it as to cause sensible injury to the plaintiffs. Therefore the plaintiffs, coming here to complain of the defendants' user, must prove sensible injury. . . . The defendants are entitled to use the water in this watercourse in a reasonable way, not causing any sensible injury to the plaintiffs."

So in *Williams v. Morland*⁸ it was held that a lower riparian owner had no right of action against an upper owner who had erected a dam across the stream, unless actual damage could be proved. "It is not sufficient," says Littledale, J.,⁹ "to allege in a declaration that the defendant prevented the water from flowing to the plaintiff's premises. The plaintiff must state an actual damage accruing from the want of the water."

So in *Miner v. Gilmour*¹⁰ Lord Kingsdown defines the limits of the right of extraordinary user by saying that a riparian owner "has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury." So also in *Embrey v. Owen*¹¹ the plaintiff, a millowner, was held to have no right of action against the defendant, an upper riparian owner, who used the water for the purpose of irrigation, it not being shown that the plaintiff had thereby suffered any inconvenience in respect of his mill or otherwise.

⁶ (1902) 1 Ch. 649.

⁷ At pp. 670, 671.

⁸ (1824) 2 B. & C. 910; 26 R.R. 579.

⁹ At p. 917.

¹⁰ (1858) 12 Moore P.C. p. 156.

¹¹ (1851) 6 Ex. 353.

5. It will be noticed that this rule as to the necessity of actual damage marks the essential difference between an action for the riparian use of water and an action for the non-riparian use of it. We have already seen that the right to prohibit non-riparian user either by the upper riparian owners or by strangers is absolute and in no way dependent on the reasonableness of the user or on any damage caused by it.¹² But on the contrary, the right to prohibit riparian user by an upper riparian owner is a qualified and limited right, dependent entirely on the unreasonable nature of the user so objected to, and therefore (in the case of user for extraordinary purposes) dependent on proof of actual damage resulting from it.¹³

6. It seems clear on principle that the damage which must be proved in order to sustain an action for unreasonable riparian use must amount to an interference with some riparian use of the water by the plaintiff. That he is thereby prevented from making some non-riparian use of it (*e.g.*, selling it to the inhabitants of some neighbouring town or to some owner of non-riparian land) cannot entitle him to complain of a riparian use of it made by an owner higher up the stream. In other

Damage must be an interference with riparian uses.

¹² *McCartney v. Londonderry Rly. Co.* (1904) A.C. 301.

¹³ General *dicta* as to the necessity of proof of actual damage must be read in the light of this distinction between riparian and non-riparian use, which has not always been sufficiently adverted to in express terms. More than once it has been stated in general terms that in actions for abstraction of water no proof of damage is needed. See for example, *Embrey v. Owen* (1851) 6 Ex. 353, *Sampson v. Hoddinott* (1857) 1 C.B. (N.S.) 590. But if this were true in the case of riparian as well as in that of non-riparian use, what would become of the right of reasonable user supposed to be vested in the upper riparian proprietors? And what other test of reasonableness can be or has been adopted, save the effect of the user upon the interests of the lower owners?

It is to be observed in this connection, however, that when the plaintiff is a reversionary owner, and not an occupier, it may be sufficient if he can prove damage suffered by the present occupier, though none is suffered by himself: because the circumstances may be such that by the continuance of the user complained of (which is wrongful as against the tenant) a prescriptive right may be acquired even against the reversioner himself, and this prospective injury he is entitled to prevent by a present action. *Sampson v. Hoddinott* (1857) 1 C.B. (N.S.) 590; *Young v. Bankier Distillery* (1893) A.C. p. 698, *per* Lord Macnaghten: "Any invasion of this (riparian) right causing actual damage, or calculated to found a claim which may ripen into an adverse right, entitles the party injured to the intervention of the Court."

words, every riparian owner may use the water for riparian purposes, so long as he does not interfere with the riparian use of it by lower owners ; but he is not bound to take any account of the requirements of the lower owners for non-riparian use. To hold otherwise would be to render nugatory the right of an upper owner, by allowing a lower owner to demand the whole of the water for himself and his grantees for all purposes.

§ 87.—Abstraction of Underground Water.

No action for interference with underground water.

1. It is not actionable for a man to do on his own land any act which interferes with the underground percolation of water, even though water is thereby intercepted which would otherwise have reached a surface stream or the land of another person.

Chasemore v. Richards.

This is the doctrine established by the House of Lords in the leading case of *Chasemore v. Richards*.¹ The defendants sank a well a quarter of a mile away from a natural stream, and pumped up water for the supply of a neighbouring town ; and although the effect was materially to diminish the volume of water in the stream by intercepting its underground sources of supply, it was held that riparian owners had no cause of action. So also in *Acton v. Blundell*,² where the mining operations of the defendant had the effect of drying up the plaintiff's well, this was held to be merely *damnum sine injuria*.³

2. It makes no difference whether the harm so done is accidental or intentional, or whether it is or is not incidental to the honest and reasonable use by the defendant of his own land for his own purposes. The right to abstract or intercept underground water is absolute and unconditional.⁴

Alister with defined underground channel.

3. Where, however, underground water runs in a defined and known channel, as in the case of those streams which for part of their course run beneath the ground, it is subject to the same rules as those which protect a natural stream upon

¹ (1859) 7 H.L.C. 349. ² (1843) 12 M. & W. 324 ; 67 R.R. 361.

³ See also *Reg. v. Metropolitan Board of Works* (1863) 3 B. & S. 710 ; *New River Co. v Johnson* (1860) 2 E. & E. 435 ; *Bradford Corporation v. Ferrand* (1902) 2 Ch. 655.

⁴ *Mayor of Bradford v. Pickles* (1895) A.C. 587.

the surface.⁵ Thus it is actionable to abstract water from a spring which directly feeds a natural stream, even though the spring is tapped beneath the surface, and the water is abstracted before it has become part of the visible stream.⁶

4. Notwithstanding the rule in *Chasemore v. Richards* it is an actionable wrong to abstract water from a natural stream by causing it to percolate through the adjacent or subjacent *strata*. Every landowner in the neighbourhood of a stream is at liberty by drainage or pumping or otherwise to prevent underground water from reaching the stream, but he is not at liberty, even by the same means, to withdraw water which has already reached it.⁷

Diminution of a surface stream by percolation.

5. Except, however, in this case of a natural stream, the rule in *Chasemore v. Richards* would seem to apply to the *abstraction* of underground water from the land of one's neighbour, no less than to the *interception* of underground water which would otherwise have reached that land.⁸

6. The pollution of underground water, as opposed to the abstraction or interception of it, is actionable as a nuisance.⁹

§ 88.—The Pollution of Water.

1. The pollution of a natural stream is a wrong actionable at the suit of any riparian owner past whose land the water so polluted flows. Such pollution, though it consists in allowing the escape of deleterious matter from the defendant's land to the plaintiff's, is not a mere nuisance, but is to be rightly classed as the wrongful disturbance of a servitude. It is an infringement of the positive right of a riparian owner to receive the pure water of the stream, and not the infringement of the merely negative right possessed by every landowner not to have foul water or any other deleterious substance cast upon his land. It differs, therefore, from the pollution

Pollution of a natural stream actionable.

⁵ *Chasemore v. Richards* (1859) 7 H.L.C. p. 374 *per* Lord Chelmsford. See *Bradford Corporation v. Ferrand* (1902) 2 Ch. 655.

⁶ *Dudden v. Clutton Union* (1857) 1 H. & N. 627.

⁷ *Grand Junction Canal Co. v. Shugar* (1871) 6 Ch. 483; *Jordeson v. Sutton Gas Co.* (1899) 2 Ch. at p. 251. See also *English v. Metropolitan Water Board* (1907) 23 T.L.R. 313.

⁸ *Salt Union v. Brunner* (1906) 2 K.B. 822.

⁹ *Ballard v. Tomlinson* (1885) 29 Ch.D. 115.

of the atmosphere, which is a mere nuisance, inasmuch as a landowner has no servitude entitling him to the passage of air across his land. For the same reason it differs from the pollution of underground water, which is actionable as a nuisance,¹ although, since there is no right to receive such water, its mere abstraction is not actionable.² Indeed, unless the riparian owner is the owner of part of the bed of the stream as well as of its banks, the pollution of a stream is not a nuisance at all, but solely the disturbance of a servitude, since there is in such a case no escape of any deleterious substance into the plaintiff's land at all.

Pollution
defined.

2. The term pollution is here used in a wide sense to include any alteration of the natural quality of the water, whereby it is rendered less fit for any purpose for which in its natural state it is capable of being used. Thus it is actionable to raise the temperature of the stream by discharging into it hot water from a factory,³ or to make soft water hard by discharging into the stream water impregnated with lime,⁴ no less than to pollute the stream by pouring into it the sewage of a town or the chemical refuse from a factory.⁵

No proof of
damage
required.

3. Pollution is actionable without proof of actual damage. The right of the lower owner is an absolute right to the continued flow of the stream in its natural quality, and any sensible alteration of this quality which renders the water less fit for any purpose is an actionable wrong, even though the plaintiff has not in fact been prevented from making any use of the water which he has hitherto made or now desires to make of it.⁶ There is no right of "reasonable pollution" vested in the upper riparian owners, to which the right of the lower owners is subject as it is subject to the upper owners' right of reasonable use by way of abstraction. An action for pollution will therefore lie, although the water is already, independently of any act of the defendant, so polluted by the

¹ *Ballard v. Tomlinson* (1885) 29 Ch.D. 115.

² *Chasemore v. Richards* (1859) 7 H.L.C. 349.

³ *Ormerod v. Todmorden Mill Co.* (1883) 11 Q.B.D. 155.

⁴ *Young v. Bankier Distillery Co.* (1893) A.C. 691.

⁵ *Wood v. Waud* (1848) 3 Ex. 748. 77 R.R. 809; *Crossley v. Lightowler* (1867) L.R. 2 Ch. 478.

⁶ *Crossley v. Lightowler* (1867) L.R. 2 Ch. 478.

acts of other riparian owners that no additional damage is caused by the defendant's contribution.⁷

4. Yet although actual damage need not be proved, actual pollution must be : *i.e.*, it must be shown not merely that the water has been in some way affected in its natural quality, but that by reason of this alteration it is now less suitable than it was before for some purpose to which it might be applied. If for all practical purposes it is as *good* as it was in its natural condition, no riparian owner can complain merely because it is *different* from what it was. Thus impurities the only effect of which is to make water unfit for drinking may doubtless be lawfully discharged into a stream which is in its natural condition already unfit for that purpose. So the fouling of a stream is not actionable at the suit of a lower riparian owner, if the pollution is no longer sensible when the water reaches his land.⁸

§ 89.—Obstruction of a Stream.

1. The erection of any obstruction in the bed of a natural stream, whereby the water is thrown back upon the land of an upper riparian owner, or across upon the land of the opposite riparian owner, is actionable at the suit of the owner so affected. A riparian owner has not merely a *right* to receive the water of the stream, but owes towards all upper and opposite riparian owners a *duty* to receive and transmit it. The obstruction of a stream, therefore, may be not only a wrong to the lower owners who are thereby deprived of the water, but also a wrong to the upper owners from whose lands it is prevented from flowing away, and to the opposite owners on whose land more water is cast than would flow there in the ordinary course.¹

Obstruction
of a natural
stream.

2. An obstruction which has no such effect upon any upper or opposite owner is lawful. While a stream is flowing

⁷ *Crossley v. Lightowler* (1867) L.R. 2 Ch. 478 ; *Wood v. Waud* (1848) 3 Ex. 748, 77 R.R. 809.

⁸ *Att.-Gen. v. Cockermouth Local Board* (1874) 18 Eq. 172.

¹ *Bickett v. Morris* (1866) L.R. 1 Sc. Ap. 47, as explained in *Orr Ewing v. Colquhoun* (1877) 2 A.C. 839 ; *McGlone v. Smith* (1888) 22 L.R. Ir. 559.

within a man's own land, he may do what he pleases with it by way of diversion or obstruction, and does no wrong thereby to any riparian owner, so long as he does not in the result compel any one to receive water which he would not otherwise have been burdened with, or deprive any one of water of which he would otherwise have had the benefit.²

3. It is doubtless lawful for any riparian owner to protect his land from the overflow of the stream in times of flood by raising its banks or in any other way that does not amount to an obstruction in the bed of the stream, even though the effect of these protective measures is to cast the flood water upon the lands of other proprietors ; for no man is bound to receive the overflow of a stream, as he is bound to receive the stream itself.³ Nevertheless if a stream has an established flood channel in addition to its ordinary channel, any obstruction of the former is just as illegal as an obstruction of the latter.^{4 5}

² *Orr Ewing v. Colquhoun* (1877) 2 A.C. at p. 856, *per* Lord Blackburn.

³ *Nield v. London & N.W. Rly Co.* (1874) L.R. 10 Ex. 4.

⁴ *Menzies v. Breadalbane* (1828) 3 Bli. N.R. 414 ; 32 R.R. 103.

⁵ A difficult and unsettled point in the law as to water-rights is the position of a non-riparian owner who, by grant from a riparian owner, is in the enjoyment of an artificial watercourse diverted from a natural stream : as when a mill-owner or manufacturer takes water from the stream in a millrace or pipe for the use of his mill or factory on non-riparian land. Has such a grantee any right of action for the obstruction or pollution of the water so obtained by him ? In considering this question we shall assume that the plaintiff's right to the water has been created by deed, and not merely by verbal or written agreement, so that if such an easement can exist at all, it has been duly created and is not a mere license.

(a) It is clear, to begin with, that no such grant can confer on the grantee as against the lower riparian owners any right to diminish the stream by abstraction, and that any such diminution by a non-riparian grantee is actionable *per se* at the suit of a lower owner, even though an equal diminution by the grantor himself would have been lawful. But if no sensible diminution is so caused, the use of the water by the grantee is no injury to the lower owners or to any one else. *Kensit v. Gl. E. Rly. Co.* (1884) 27 Ch.D. 122.

(b) It is also clear that the grantee cannot complain of any diminution of his supply by the use of the water for riparian purposes by riparian owners higher up the stream. For the right of these owners is to use the water as they please for riparian purposes, subject only to the similar right of lower owners to use it for their own riparian purposes, but not subject to the requirements of non-riparian

§ 90.—Rights of Way.

1. Rights of way are either private or public. The former call for no special consideration, for they are governed by the ordinary principles already considered by us in relation to Public and private rights of way.

grantees of the lower owners. See *Nuttall v. Bracewell* (1866) L.R. 2 Ex. p. 13, *per* Channell B.

(c) It is also settled that if the grantee is himself a riparian owner and is using the water for riparian purposes, the fact that he draws the water from the stream, not at the point where it adjoins his property but from a point higher up, under the grant or license of an upper proprietor, he has the same right to complain of the abstraction of the water as if he drew it directly from his own bank. *Nuttall v. Bracewell* (1866) L.R. 2 Ex. 1; see also *Holker v. Porritt* (1875) L.R. 10 Ex. 59.

(d) So also it is not disputed that a grant of water rights to a non-riparian owner is valid and enforceable against the grantor himself. *Stockport Waterworks Co. v. Potter* (1864) 3 H. & C. 300.

(e) There remains, therefore, only this question: Can a non-riparian grantee sue an upper riparian owner for the pollution of the water or for its diminution by non-riparian use? On principle there would seem to be no reason why he should not. He is the grantee of a legally created easement appurtenant to his own land over the servient riparian land of his grantor, and his enjoyment of this easement is interfered with by an act of the defendant which is admittedly wrongful as against the grantor. Why, then, should not the grantee have in his own name a good cause of action for this injury? In *Fitzgerald v. Firbank* (1897, 2 Ch. 96) it was decided by the Court of Appeal that the grantee of a right of fishing in a stream had a good cause of action in his own name to prevent the pollution of the stream; and if the grant of a profit is valid for this purpose, it would seem that the grant of an easement appurtenant must be equally efficacious. Nevertheless it was held by a majority of the Court of Exchequer in *Stockport Waterworks v. Potter* (3 H. & C. 300.) that no action would lie for the pollution of a stream at the suit of a waterworks company who by grant from a riparian owner drew water in pipes to their reservoir for the supply of a neighbouring town. It is submitted that the dissenting judgment of Bramwell, B., in this case was correct. The approval with which this decision has been cited in certain later cases does not relate to the point now in question, but solely to the undoubted principle that no such grant to a non-riparian owner can render his use of the water lawful as against lower riparian owners—a very different matter. See *Ormerod v. Todmorden Joint Stock Mill Co.* (1883) 11 Q.B.D. 155; *McCartney v. Londonderry Rly. Co.* (1904) A.C. 301.

(f) If the non-riparian plaintiff is in the enjoyment of the water not under any deed of grant but solely by parol agreement, his legal position is rendered additionally uncertain by reason of those unsettled points relating to the rights of licensees and possessory owners of servitudes which we have already considered. See above, p. 226, n. 14.

easements in general. Public rights of way, on the other hand, demand more particular examination. They are of two kinds, for they exist either over highways or over navigable rivers. The law as to these two is essentially the same, and although we shall here speak specifically of highways only, it will be understood that *mutatis mutandis* the same principles are for the most part applicable to navigable rivers also.

Highways.

2. A highway (including in that term any public road) is a piece of land over which the public at large possesses a right of way. At common law the ownership of a highway is in the owner or owners of the land adjoining it on either side, the highway having been made such by an actual or presumed dedication of it to the use of the public by the proprietors of the land over which it runs. By statute this common law rule has been so far derogated from that certain kinds of highways are now vested in the municipal corporations or other corporate local authorities having the care and management of them. These statutes, however, have been so interpreted as to vest in the local authorities not the whole of the land on which the highway lies *usque ad coelum et ad inferos*, but only so much of it above and below the surface as is reasonably necessary for the efficient construction, care, and use of the highway. The subsoil below and the space above the limits so defined remain as at common law in the owners of the adjoining lands.¹

Classes of injuries in respect of highways.

3. There are at least four distinct kinds of injury which may be committed in respect of a highway :

- (a) Modes of user amounting to a trespass against the owner of the highway. In dealing with the law of trespass we have already sufficiently considered this matter. We there saw that he who enters upon a highway for any other purpose than that of passage and the purposes lawfully incidental to passage is guilty of an actionable trespass against the owner of the land.²
- (b) Modes of user amounting to a nuisance to the occupiers of adjoining land. This also is a matter which need

¹ *Wandsworth Board of Works v. United Telephone Co.* (1884) 13 Q.B.D. 904.

² *Supra*, p. 159.

not be further considered, for it has been already touched upon under the head of nuisance. Thus in *Benjamin v. Storr*² it was held to be a nuisance, actionable at the suit of the occupier of a shop adjoining the street, to allow horses to stand so constantly in front of the shop as to darken its windows and pollute the atmosphere.

- (c) Disturbance of that right of access to the highway which is possessed by every occupier of adjoining premises.
- (d) Public nuisance to a highway, *i.e.*, the unlawful disturbance of the public right of passage thereon.

These two last forms of injury have not yet been considered and will form the subject of the succeeding sections.

§ 91.—Disturbance of the Right of Access to a Highway.

1. Every person who occupies land immediately adjoining a highway has a private right of access to the highway from his land and *vice versa*; and any act done without lawful justification whereby the exercise of this private right is obstructed is an actionable wrong.¹

Private right
of access to
public
highway.

2. This right of access to a highway by the occupier of land abutting upon it must be distinguished from the right of passing along the highway. The former is a private and the latter a public right; and for any infringement of the former an action will lie, whereas, as we shall see, no action will lie for an infringement of the public right of passage except on proof of some special or particular consequential damage suffered by the plaintiff.

3. The private right of access thus protected includes merely the right to get from the highway into the plaintiff's

² (1874) L.R. 9 C.P. 400. *Supra*, p. 204.

¹ *Rose v. Groves* (1843) 5 M. & G. 613, 63 R.R. 415; *Chaplin v. Westminster Corporation* (1901) 2 Ch. 329; *Att.-Gen. v. Thames Conservators* (1862) 1 H. & M. p. 31; *Lyon v. Fishmongers' Co.* (1876) 1 A.C. 662; *Metropolitan Board of Works v. McCarthy* (1874) L.R. 7 H.L. 243; *Fritz v. Hobson* (1880) 14 Ch.D. 542; *Barber v. Penley* (1893) 2 Ch. 447; *Benjamin v. Storr* (1874) L.R. 9 C.P. 400.

land and from his land into the highway, and does not include a right to get to and from the plaintiff's land by going along the highway, for this is merely the public right of passage.⁵

4. A disturbance of this private right of access may or may not be at the same time a disturbance of the public right of passage. A man's doorway may be obstructed by an act which in no way obstructs the use of the highway; and conversely the highway may be obstructed, while the right of access remains unaffected.

§ 92.—Nuisance to a Highway.

Nuisance to
a highway.
A mis-
demeanour.

1. A nuisance to a highway is an act done without lawful justification, whereby the exercise of the public right of passage is obstructed or rendered dangerous. The term nuisance is here used in the sense of public nuisance, *i.e.*, an indictable misdemeanour. Under what circumstances such an act is also a civil wrong actionable at the suit of an individual, we are about to consider.

2. A nuisance to a highway consists either in obstructing it, or in rendering it dangerous. Examples of the first are stopping a highway by erecting a fence across it; narrowing it by a fence or building which projects beyond the boundary line; leaving horses and carts standing in it for an unreasonable time or in unreasonable numbers;¹ collecting a crowd of people in it, as at a theatre door or a public meeting;² making excavations or erections in it without lawful authority. Wrongful danger to the highway, on the other hand, may be caused either by something done in the highway itself, or by something done on the land which adjoins it. Examples are leaving unlighted or unguarded an excavation or obstruction, even though lawfully created;³ keeping in the highway defective and dangerous tramway lines, coal plates, or cellar gratings;⁴ leaving on the highway or adjacent thereto

⁵ See *Chaplin v. Westminster Corporation* (1901) 2 Ch. 329.

¹ *Benjamin v. Storr* (1874) L.R. 9 C.P. 400; *Fritz v. Hobson* (1880) 14 Ch.D. 542.

² *Barber v. Penley* (1893) 2 Ch. 447.

³ *Penny v. Wimbledon Urban Council* (1899) 2 Q.B. 72.

⁴ See *Pretty v. Bickmore* (1873) L.R. 8 C.P. 401. *Aliter* with structures which are really part of the highway and are therefore to be

unusual objects calculated to frighten horses ;⁵ allowing a house, fence, or other structure immediately adjoining the highway to become ruinous and dangerous ;⁶ keeping unfenced an excavation so close to the highway as to be a danger in case of accidental deviation.⁷

3. When, however, a road is dedicated to the public, it is presumed to be so dedicated on the terms that the public right of passage is to be subject to all obstructions and dangers which exist at the time of dedication ; and the adjoining owners and occupiers are therefore under no liability for maintaining such obstructions or dangers or for any mischief that may result from them.⁸

4. A nuisance to a highway amounts to a misdemeanour, and may be made the subject of an indictment at common law, or of some other criminal proceeding sanctioned by statute in particular classes of cases. It may also be restrained by injunction at the suit of the Attorney-General acting *ex officio* or at the relation of a local authority or any private person interested in the matter. But it is not *per se* actionable at the suit of a private person—a rule established for the purpose of preventing oppression by means of a multiplicity of civil actions for the same cause. No such action will lie save at the suit of a person who can show special and particular damage suffered by himself and distinct from the general inconvenience endured by him in common with the public at large. In *Winterbottom v. Lord Derby*⁹ Kelly, C.B., says : “ The rule of the law on the subject . . . is that in order to entitle a plaintiff to maintain an action, he must show a particular damage suffered by himself over and above that suffered by all the Queen’s subjects. . . He and he only can

Nuisance to a highway not actionable unless it causes special damage to individuals.

repaired by the local authority and not by the adjoining occupiers. *Robbins v. Jones* (1863) 15 C.B. (N.S.) 221.

⁵ *Wilkins v. Day* (1883) 12 Q.B.D. 110 ; *Harris v. Mobbs* (1878) 3 Ex.D. 268 ; *Brown v. Eastern & Midlands Rly. Co.* (1889) 22 Q.B.D. 391.

⁶ *Harrold v. Watney* (1898) 2 Q.B. 320.

⁷ *Barnes v. Ward* (1850) 9 C.B. 392, 82 R.R. 375 ; *Hardcastle v. Yorkshire Rly. Co.* (1859) 4 H. & N. 67.

⁸ *Fisher v. Prowse* (1862) 2 B. & S. 770.

⁹ (1867) L.R. 2 Ex. pp. 320, 322.

maintain an action for an obstruction, who has sustained some damage peculiar to himself, his trade, or calling. A mere passer by cannot do so, nor can a person who thinks fit to go and remove the obstruction."

What
damage
is sufficient.

5. The special damage that is necessary and sufficient to support an action may be some injury to person or property, as when the plaintiff has broken his leg by falling over an obstruction in the highway; or it may be an injury to his pecuniary interests, as when he has incurred expense or suffered pecuniary loss by being prevented from using the highway. Thus in *Rose v. Miles*¹⁰ the plaintiff, who complained of the obstruction of a navigable canal, was held to have a good cause of action on proving that he had been compelled to unload his goods from barges and carry them overland, thereby incurring additional expense. So in *Iveson v. Moore*¹¹ it was held to be sufficient special damage that the plaintiff, a coalowner, had incurred loss in his business by being prevented from carrying his coal from his pit along the highway.

Whether
injury to
business by
obstructing
highway
is sufficient.

6. It is commonly said that no action will lie if the only special damage proved is an injury to the plaintiff's business, due to the fact that the obstruction to the highway has hindered the public from resorting to his business premises. In other words, it is said that the special damage must be suffered by the plaintiff because *he* has been prevented from using the highway as beneficially as heretofore, and not merely because *other persons* have been so hindered, even though the result of their hindrance is a loss suffered by himself. The opposite, indeed, was decided by the Court of Common Pleas in *Wilkes v. Hungerford Market Co.*,¹² but this case is commonly considered as having been overruled by the House of Lords in *Ricket v. Metropolitan Rly. Co.*¹³ It is to be remarked, however, that there is nothing in the *decision* of the House of Lords in this case which is incon-

¹⁰ (1815) 4 M. & S. 101; 16 R.R. 405.

¹¹ (1699) 1 Ld. Raym. 486; 12 Mod. 262.

¹² (1835) 2 Bing. N.C. 281.

¹³ (1867) 2 H.L. 175; see *Beckett v. Midland Rly. Co.* (1867) L.R. 3 C.P. p. 85, *per* Willes, J.; *Eagle v. Charing Cross Rly. Co.* (1867) L.R. 2 C.P. p. 650, *per* Montague Smith, J.

sistent with the *Hungerford Market Case*, and that the observations made upon the latter case are *dicta* unnecessary to the matter in hand. *Ricket's Case* decides merely that on the true interpretation of the Lands Clauses Act and the Railways Clauses Act claims to compensation under these Acts are limited to damage done to the property affected, and do not extend to damage done to the goodwill of a business.¹⁴ It is submitted, therefore, that the question still remains open, and that it is worthy of serious consideration whether damage done to the plaintiff in his trade by the illegal obstruction of a highway is not an actionable wrong.¹⁵

§ 93.—Absolute Liability for Danger to Highway.

1. Any person who procures or authorises the doing in any highway of any dangerous act other than the use of the highway for ordinary purposes of passage is vicariously liable for any damage caused by the negligence of those employed in the doing of that act, whether they are his servants or not.

He who authorises danger in highway is vicariously liable for negligence of independent contractor.

This is another instance of those rules of absolute or vicarious liability, of which we have already considered several. The leading authority for it is *Penny v. Wimbledon Urban Council*.¹ In this case the defendant district council employed a contractor to repair a highway. In carrying out the work he negligently left on the road a heap of soil unlighted and unprotected. The plaintiff, walking along the road after dark, fell over this obstruction and was injured, and it was held by the Court of Appeal that the defendant council was responsible for the negligence of the contractor thus employed by them. A. L. Smith, L.J., quotes with approval the reasoning of Bruce, J., in the court below:² "The principle, . . . I think, is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are

¹⁴ See Lord Chelmsford's explanation of *Ricket's Case* in *Metropolitan Board of Works v. McCarthy* (1874) 7 H.L. at pp. 256, 259.

¹⁵ See also *Rose v. Groves* (1843) 5 M. & G. 613, 63 R.R. 415; *Fritz v. Hobson* (1880) 14 Ch.D. 542; *Iveson v. Moore* (1699) 1 Ld. Raym. 486.

¹ (1899) 2 Q.B. 72.

² (1898) 2 Q.B. p. 217.

taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor."

So in *Holliday v. National Telephone Co.*³ the defendant company was held liable on the same principle for the negligence of the servant of a plumber (an independent contractor) employed by them to do work in a public street. This servant had by dipping a benzoline lamp into a caldron of molten solder caused an explosion which scattered the solder into the air and so injured the plaintiff, a passenger in the highway.

So in *Tarry v. Ashton*⁴ the occupier of a house abutting on the street was held liable for injury caused to the plaintiff by the fall of a lamp suspended over the doorway, although he was guilty of no fault, the only negligence being that of an independent contractor whom he had recently employed to put the lamp in repair.⁵

Aliter with ordinary use of highway.

2. This rule of vicarious liability does not extend to dangers incidental to the ordinary use of a highway for purposes of traffic. He who creates or authorises a danger of this

³ (1899) 2 Q.B. 392.

⁴ (1876) 1 Q.B.D. 314.

⁵ See also for applications of the same principle *Gray v. Pullen* (1864) 5 B. & S. 970 (drain constructed and roadway insufficiently restored); *Hole v. Sittingbourne Rly. Co.* (1861) 6 H. & N. 488 (defective bridge erected so as to obstruct canal); *The Snark* (1900) P. 105 (wreck in navigable river insufficiently lighted by the negligence of an independent contractor); *Clements v. Tyrone County Council* (1905) 2 I.R. 415, 542. The case of *Hardaker v. Idle District Council* (1896) 1 Q.B. 335, in which the council was held liable for the escape of gas from mains in the street into the plaintiff's house, is probably to be regarded as an application or extension of the rule in *Rylands v. Fletcher*, as to which, see *ante*, p. 204.

The case of *Pickard v. Smith* (1861) 10 C.B. N.S. 470, in which the occupier of refreshment rooms in a railway station was held liable for the negligence of a coal merchant who, in delivering coals to the defendant, left unfastened a coal plate upon the adjoining platform, is apparently to be taken as deciding that the same rule as to vicarious liability for dangers to a highway or navigable river extends to all places in which there is a public right of access or entry. As to the reasons given for some of the foregoing decisions, see above p. 204. n. 3.

kind does not do so at his peril, but will answer only for his own personal negligence and for that of his servants. If I engage a cab, the cabman is not my servant, and I am not responsible to persons who may be run down by his negligent driving.⁶ So if I employ a carrier to carry goods for me through the streets, I am not responsible for the carelessness with which he does it.

3. The liability in question is not independent of all negligence whatever. It is merely independent of the personal negligence of the defendant or his servants. It is a case of vicarious liability for the negligence of independent contractors. If, in the case of work being lawfully done in the highway, an accident happens without any fault on the part of any one, he who authorised the work is free from all responsibility. Thus in *Lambert v. Lowestoft Corporation*⁷ the defendant corporation was held not liable for the giving way of a sewer in the street, without any proof of negligence on the part of any one in the construction or maintenance of it.⁸

⁶ *Quarman v. Burnett* (1840) 6 M. & W. 499; 55 R.R. 717.

⁷ (1901) 1 Q.B. 590. See also *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781.

⁸ There is said to be an exception to this rule of absolute liability when the negligence of the independent contractor for which it is sought to make his employer liable is merely collateral. See *Hole v. Sittingbourne Rly. Co.* (1861) 6 H. & N. at p. 497; *Dalton v. Angus* (1881) 6 A.C. at p. 829; *Hardaker v. Idle District Council* (1896) 1 Q.B. at p. 340; *Penny v. Wimbledon Urban Council* (1899) 2 Q.B. p. 76. In a certain sense this is obviously true. For if collateral negligence means negligence outside the matter in which the independent contractor is employed by the defendant, it is clear that the defendant can be under no liability; he would not be responsible in such a case even if the party so negligent were his servant. This, however, is not the sense in which the term collateral negligence is used in the *dicta* referred to; it is clearly used to indicate some kind of negligence for which the master of a servant is liable, but for which the employer of an independent contractor is not. The reality of any such distinction may well be doubted. Its existence is not established by any decided case, and its nature is not rendered clear by any of the judicial references that have been made to it. In *Holliday v. National Telephone Co.* (1899) 1 Q.B. 221, the case already cited in which molten solder was scattered by the explosion of a benzoline lamp, judgment was given for the defendant in the court below on the express ground that the negligence of the plumber was merely collateral. "The act," says Wills, J., "of Alfred Highmore in carelessly plunging into molten metal a lamp which he

§ 94.—Liability for the Non-Repair of Roads.

No liability
for damage
due to non-
repair of
roads.

1. In the absence of an express statutory provision to that effect, no action will lie against any local authority intrusted with the care of highways for damage suffered in consequence of the omission of the defendants to perform their statutory duty of keeping the highway in repair; but this exemption from liability extends only to cases of pure non-feasance, and the local authority is responsible in damages for any active misfeasance by which the highway is rendered dangerous.

2. This is a particular application of the general principle, which will be considered later, that no action will lie for the breach of a statutory duty unless the legislature in creating the duty intended this remedy to be available. At common law the duty of repairing highways rested upon the inhabitants of the parish, and was enforceable by way of indictment only, and not by way of action at the suit of an individual, even though he had suffered special damage.¹ Nor would an action lie against a surveyor of highways appointed under statutory provisions, it being held that the legislature did not intend to subject the surveyor, who was only the agent of the parish in this matter, to a liability from which the parish itself was free.² Finally when the care of highways was transferred by statute to corporate local authorities, the same rule of exemption was applied to them. The duty of repair, in being thus transferred from the inhabitants at large to a body corporate, has not changed its nature, nor does the

wanted to heat, containing benzoline and having a safety valve out of order, is about as typical an instance of negligence merely casual, collateral, or incidental, as can well be conceived." Nevertheless the Court of Appeal disagreed with this view of the case, and gave judgment for the plaintiff. No explanation of collateral negligence was given however. In the case of *Reedie v. London & N.W. Rly. Co.* (1849) 4 Ex. 244, 80 R.R. 541, the defendants were held not liable for injury caused to a passenger in the highway upon whom a workman employed by their contractor dropped a brick while building a railway bridge. This has been regarded as an example of the rule as to collateral negligence, but it would seem difficult to reconcile the decision with that of *Holliday v. National Telephone Co.* (1899) 2 Q.B. 392.

¹ *Russell v. Men of Devon* (1788) 2 T.R. 667; 1 R.R. 585.

² *Young v. Davis* (1872) 7 H. & N. 760.

breach of it now, any more than formerly, confer any right of action upon injured individuals.³

3. This exemption from liability does not extend to bodies, such as tramway companies, which are empowered to place lines or other structures in the streets on the terms that they shall keep the adjoining portions of the roadway in good repair. In such cases an action will lie at the suit of any person injured through the breach of this obligation.⁴

4. The rule of exemption applies only to cases of mere passive nonfeasance—mere omission to repair. It does not extend to an active misfeasance—a positive act by which a danger is wrongfully caused in the highway and by which the plaintiff has come to harm. Local authorities are saved from any civil liability for merely failing to do what ought to have been done, but are liable at common law for doing that which ought not to have been done.⁵

It is a misfeasance within the meaning of this rule, and not a mere nonfeasance, to erect or place in the highway any artificial structure which is not itself a part of the highway, and then to allow that structure, as opposed to the highway itself, to fall into a dangerous state of disrepair. Thus in *White v. Hindley Board of Health*⁶ a local board of health having charge both of the road and of the sewers beneath it, was held liable for allowing the grating of a sewer to become so worn as to become a nuisance to the highway, whereby the plaintiff suffered an injury. This decision was approved in *Blackmore v. Vestry of Mile End*⁷ in which the cause of mischief was the cover of a water meter. Similarly in *The Borough of Bathurst v. Macpherson*⁸ (explained, with the

Aliter with act of misfeasance making road dangerous.

Non-repair of artificial structure in road.

³ *Cowley v. Newmarket Local Board* (1892) A.C. 345; *Municipality of Pictou v. Geldert* (1893) A.C. 524; *Municipal Council of Sydney v. Bourke* (1895) A.C. 433; *Maquire v. Corporation of Liverpool* (1905) 1 K.B. 767.

⁴ *Dublin Tramways Co. v. Fitzgerald* (1903) A.C. 99.

⁵ *Foreman v. Mayor of Canterbury* (1871) L.R. 6 Q.B. 214; *Penny v. Wimbledon Urban Council* (1899) 2 Q.B. 72; *Whyler v. Bingham Rural Council* (1901) 1 Q.B. 45; *Corporation of Shoreditch v. Bull* (1904) 90 L.T. 210.

⁶ (1875) L.R. 10 Q.B. 219.

⁷ (1882) 9 Q.B.D. 451.

⁸ (1879) 4 A.C. 256.

correction of certain erroneous *dicta*, in *Municipal Council of Sydney v. Bourke*)⁹ the defendant corporation had constructed a drain below the roadway, and had allowed this drain to fall into disrepair, whereby the surface of the road was so weakened that it fell in, and so caused injury to the plaintiff; and it was held that this was a misfeasance on the part of the corporation, and not a mere omission to keep the road in repair, and that they were liable in damages.

No liability for non-repair of bridge.

A bridge, however, is not an artificial structure in the highway within the meaning of this rule, but is itself a part of the highway, and there is no liability for its non-repair.¹⁰

Artificial structure dangerous only because of non-repair of road.

5. If the danger is caused not by any defect in the artificial structure itself, but solely by the wearing away or disrepair of the highway, whereby the structure is rendered a source of danger, there is no liability at all: none in respect of the artificial structure, for it is not defective; and none in respect of the road, for the case is merely one of nonfeasance. Thus in *Thompson v. Mayor of Brighton*,¹¹ overruling *Kent v. Worthing Local Board*,¹² the plaintiff was riding along a public road, and his horse's foot struck the cover of an entrance to the sewer, whereby the horse was thrown down and injured. The cover was in perfect order, but projected an inch or so above the surface of the road, owing to the wearing away of the latter. The defendants were held not liable, on the ground that the cause of the accident was a mere omission to repair the road. "Apart from the state of the road," says Lindley, L.J.,¹³ "no breach of duty can be imputed to the defendants, and consequently no cause of action has accrued to the plaintiff. But for the only breach of duty which can be imputed to the defendants, I am now compelled to say that no action lies. The law on this subject is in my opinion very unsatisfactory; but I cannot on that account declare it to be different from what it is."

6. Where the artificial structure which causes the accident has been placed in the highway, not by the local authority

⁹ (1895) A.C. 433.

¹⁰ *Municipality of Pictou v. Geldert* (1893) A.C. 524.

¹¹ (1894) 1 Q.B. 332.

¹² (1882) 10 Q.B.D. 118.

¹³ (1894) 1 Q.B. at p. 337.

having charge of the highway, but by some other person or body lawfully authorised thereto, for example a waterworks company or a tramway company, the same principles apply. If the structure is itself in disrepair, the persons who placed it there are responsible for it :¹⁴ and if the structure is in good order, but dangerous through the disrepair of the road, no one is responsible at all,¹⁵ unless, indeed, as in the case of a tramway company, the persons authorised to place the structure in the road have at the same time a statutory obligation imposed upon them to keep the adjoining portions of the road in good repair, in which case an action for damages will lie for any omission so to do.¹⁶

OTHER INJURIES TO LAND.

§ 95.—Wrongful Damage.

We have now considered four classes of injuries to land, namely, trespass, dispossession, nuisance, and disturbance of servitudes. This classification, however, although it includes almost all cases, is not exhaustive. We must recognise a further injury of small importance and infrequent occurrence, which has no recognised title, but which we may term Wrongful Damage to Land. It consists in any act done without lawful justification, and not amounting to trespass, nuisance, or the disturbance of a servitude, whereby physical harm is done to land in the possession of the plaintiff. In the immense majority of cases physical harm to land is done by way of one of the forms of injury already considered by us ; but occasionally it is done without bringing the wrongdoer within the scope of any of these causes of action. An example is wilful or negligent injury, as by fire, caused by a person lawfully on the plaintiff's premises, such as a guest, workman, servant, or licensee. This is not trespass because of the lawful entry ; and not nuisance because the cause of harm originates on the land itself, and is not a wrongful invasion from without.

¹⁴ *Chapman v. Fylde Waterworks Co.* (1894) 2 Q.B. 599.

¹⁵ *Moore v. Lambeth Waterworks Co.* (1886) 17 Q.B.D. 462.

¹⁶ *Dublin Tramways Co. v. Fitzgerald* (1903) A.C. 99.

§ 96.—Injuries to Reversionary Interests.

Injuries to
reversionary
interests.

1. Hitherto, in dealing with the injuries of trespass, nuisance, disturbance of servitudes, and wrongful damage, we have considered exclusively the rights of action thereby vested in the *occupier* of the land. For these injuries are essentially injuries to the possession of land, and not to the ownership of it. It remains, therefore, to consider the position of a reversioner—using that term in a wide sense to include any person having a lawful interest in land but not the present possession of it, the typical case being that of a landlord whose land is in the occupation of a tenant.

Waste.

Injuries to reversionary interests are of two kinds according as they are committed (1) by the tenant or other person in possession of the land, or (2) by a stranger. Injuries of the first kind may be included under the generic title of Waste, which may be defined as unlawful damage done or permitted by the occupier of land as against those having reversionary interests in it. An account of the law of waste does not pertain to the law of torts, but is a branch of the law of property and in particular of the law of landlord and tenant. For the obligations of the occupier to the reversioner are dependent on the nature of the proprietary or contractual relation existing between them in the particular case, and cannot be profitably considered in a general account of the law of torts.

Reversioner
can sue for
permanent
injury.

It is otherwise with the second class of injuries to reversionary interests, *viz.*, those which are committed not by the occupier, but by strangers. These injuries are governed by general principles which properly pertain to the law of torts. The question, therefore, which we have now to consider is this: In what circumstances will an action lie at the suit of a reversioner for an act done in respect of the land by a stranger who is not in possession of it?

2. A reversioner may sue for any trespass, nuisance, disturbance of servitudes, or wrongful damage, if, and only if, it actually affects his reversionary interest; and in general this is so, only if the effects of the injury so committed are permanent. None of these wrongs is *per se* a wrong against the reversioner or actionable at his suit. It is necessary for

him in every case to prove not merely that such a wrong has been committed, but also that his reversionary interest has been actually affected by it, so that it is a wrong against him, and not merely against the possessor. There is more than one way in which a reversionary interest may be so affected, but in general it is affected only by reason of the permanence of the consequences of the wrongful act. Temporary consequences give a cause of action only to the occupier; permanent consequences give a cause of action both to him and to the reversioner. Consequences are permanent, in this sense, if they are of such a nature that they will continue to affect the land, even after the interest of the reversioner has become an interest in possession.

In *Rust v. Victoria Graving Dock*¹ it is said by Cotton, I.J.: "It is an undoubted general rule that a reversioner or other person who has not an interest in possession in the land cannot recover any damages, unless it is shown that the injury to the land is of a permanent character, and will be injurious to the land when his estate comes into possession." So in *Shelfer v. City of London Electric Lighting Co.*² Lindley, I.J., says: "The common law decisions show that an action by a reversioner for an injury to his reversion will lie if he can prove actual damage to his reversion, or as some express it, an injury of such permanent nature as to be necessarily injurious to his reversion." Accordingly a mere trespass, unaccompanied by any physical injury to the land, is not actionable at the suit of a reversioner, even though committed under a claim to a right of way.³ Neither is a temporary nuisance, such as noise or smoke, which causes no enduring physical harm to the property.⁴ It is otherwise, however, if permanent physical harm is done, whether by way of trespass, nuisance, or otherwise: as, for example, the destruction of a building, the removal of soil, the cutting of timber, or

¹ (1887) 36 Ch.D. p. 130.

² (1895) 1 Ch. p. 318.

³ *Baxter v. Taylor* (1832) 4 B. & Ad. 72, 38 R.R. 227; *Cooper v. Crabtree* (1882) 20 Ch.D. 589.

⁴ *Simpson v. Savage* (1856) 1 C.B. (N.S.) 347; *Jones v. Chappell* (1875) 20 Eq. 539; *Mott v. Shoolbred* (1875) 20 Eq. 22; *Mumford v. Oxfordshire Rly. Co.* (1856) 1 H. & N. 34.

structural damage done to a building by the removal of support.⁵

Permanent and continuing injuries distinguished:

3. In applying this rule we must be careful not to confound a permanent injury with a continuing one. A permanent injury is a completed wrong the consequences of which will endure until the interest of the reversioner has fallen into possession, and for which accordingly he has a present right of action: *e.g.*, the destruction of a building on land in the possession of the plaintiff's tenant. A continuing injury, on the other hand, is one which is still in process of being committed: *e.g.*, a nuisance caused by the smoke or noise of a factory. We have already seen that even the occupier himself cannot recover damages for the future continuance of such a continuing injury, howsoever probable that continuance may be.⁶ He recovers damages only for the past; and if the wrong continues, he may sue a second time on the new cause of action thus arising. Since this is the case with the occupier, *a fortiori* it is so with the reversioner also. He must wait until his interest falls into possession, and then, if the injury still continues, he will have his action. Nor does anything turn upon the degree of probability of its continuance. Whether probable or improbable, he cannot sue for prospective damage any more than the occupier himself can. It must be remembered, however, that a diminution in the present saleable value of the reversion caused by the probability of further damage has been held to amount to present damage for which an action will lie.⁷

Reversioner may sue to prevent prescriptive rights.

4. Notwithstanding the preceding rule as to the necessity of permanent damage, a reversioner may sue for any continu-

⁵ *Alston v. Scales* (1832) 9 Bing. 3, 35 R.R. 502; *Shelfer v. City of London Electric Lighting Co.* (1895) 1 Ch. 287; *Tucker v. Newman* (1839) 11 A. & E. 40, 52 R.R. 276; *Rust v. Victoria Graving Dock* (1887) 36 Ch.D. 113. In exceptional cases, however, even a temporary disturbance of possession may amount to an injury to the reversion, as in *Bell v. Midland Rly. Co.* (1861) 10 C.B. (N.S.) 287, in which the royalties payable by a tenant to his landlord were diminished by the wrongful disturbance of a right of way appurtenant to the land.

⁶ Save when damages are awarded in substitution for an injunction, as the price of the legalisation of future continuance. *Supra*, pp. 116, 118.

⁷ *Tunncliffe & Hampson v. West Leigh Colliery Co.* (1906) 2 Ch. 22. Cf. *Rust v. Victoria Graving Dock* (1887) 36 C.D. 113; *Battishill v. Reed* (1856) 18 C.B. 696. See p. 116 above.

ing injury which by virtue of the law of prescription will by its continuance[[prejudicially affect his reversionary interest in the land by creating or destroying a servitude in relation thereto. On this principle it has been repeatedly decided that a reversioner may sue for an obstruction to ancient lights or for interference with a right of way.⁸ The operation of the rule depends on the law of prescription. If by that law the act complained of will operate to the prejudice of the plaintiff notwithstanding the fact that he is not in present occupation of the land, then he has a right of action given him by which he can protect himself against this mischief. But if, on the contrary, the fact that he is not in possession will by the law of prescription prevent any prejudice accruing to him, he has no present right of action.⁹ A detailed consideration of the scope and application of this rule, therefore, pertains to the law of prescription rather than to that of torts, and would here be out of place.¹⁰

⁸ *Jesser v. Gifford* (1767) 4 Burr. 2141; *Metropolitan Association v. Petch* (1858) 5 C.B. (N.S.) 504; *Shadwell v. Hutchinson* (1831) 2 B. & Ad. 97, 36 R.R. 497; *Mott v. Shoolbred* (1875) 20 Eq. 22; *Kidgill v. Moor* (1850) 9 C.B. 364. The reasoning in several of these cases is unsatisfactory owing to the fact that insufficient attention has been given to the distinction between the present rule as to the effect of prescriptive rights and the rule already considered as to the necessity of permanent damage.

⁹ See for example *Baxter v. Taylor* (1832) 4 B. & Ad. 72, 38 R.R. 227; *Mott v. Shoolbred* (1875) 20 Eq. 22.

¹⁰ See Gale on Easements, pp. 192-200, pp. 550-556, 7th ed.

CHAPTER X.

CONVERSION AND OTHER INJURIES TO CHATTELS.

§ 97—History of the Action of Trover.

1. The wrong of conversion is so dependent for a due understanding of its true nature and incidents upon a knowledge of its origin and historical development, that before attempting any systematic exposition of the present law it is necessary to give an outline of the mode in which it has come into existence.

Conversion
defined.

2. If we seek for a definition of this wrong, we may find it in the form of declaration provided for the action of trover by the Common Law Procedure Act, 1852.¹ By this enactment the form of the action was brought into harmony with its true scope and purpose by the abolition of the old fictitious allegations on which it was based ; and a new form of declaration was provided, in which it was simply alleged that “ the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff’s goods.” This is the essence of the matter. The wrong of conversion consists in any act of wilful interference with a chattel, done without lawful justification, whereby any person entitled thereto is deprived of the use and possession of it.

Three modes
of conversion

There are three distinct methods in which one man may deprive another of his property, and so be guilty of a conversion and liable in an action of trover : (1) by wrongly taking it ; (2) by wrongly detaining it ; and (3) by wrongly disposing of it. In the first case the wrongdoer acquires a possession which is wrongful *ab initio*. In the second he acquires possession rightfully but retains it wrongfully. In the third

¹ 15 & 16 Vict. c. 76, s. 49, and Sched. B.

case he neither takes it wrongfully nor detains it but so acts that it is lost to the true owner. Now although in modern law the term conversion covers all these three cases, it was originally limited to the third of them. To convert goods meant to dispose of them, to make away with them, to deal with them in such a way that neither owner nor wrongdoer has any further possession of them; for example, by consuming them, or by destroying them, or by selling them, or otherwise delivering them to some third person. Merely to *take* another's goods, however wrongfully, was not to convert them. Merely to *detain* them in defiance of the owner's title was not to convert them. Money was converted to the use of the thief when it was spent by him; food, when it was eaten; jewels, when they were pawned or sold. The fact that conversion in its modern sense includes all three modes in which a man may be wrongfully deprived of his goods, and not one mode only, is the outcome of a process of historical development, whereby by means of legal fictions and other devices the action of trover was enabled to extend its limits and appropriate the territories that rightly belonged to other and earlier forms of action.

3. Corresponding to these three modes of wrongful deprivation, there were three distinct forms of action provided by the law:—(1) *trespass de bonis asportatis*, for wrongful taking; (2) *detinue*, for wrongful detention; and (3) *trover*, for wrongful conversion, that is to say, disposal. Of these three actions, trover is the most recent in origin. Trespass and detinue date from the beginnings of our legal system, but trover is a later invention. An early instance—perhaps the earliest—occurs in Y.B. 18 Ed. IV. 23, pl. 5: “In an action on the case the plaintiff declared how he bailed certain boxes of money to the defendant to be safely kept, and how the defendant broke them *et eux convert a son oepe*.” Two cases of a similar nature are reported in Y.B. 20 Hen. VII. 4, pl. 13, and 8, pl. 18. In the thirty-third year of Henry VIII. we hear of an “action on the case that the defendant found the goods of the plaintiff and delivered them to persons unknown.”² A similar instance occurs in the following year: “Action on the case that the goods of the plaintiff came to the defendant's hands (*devenerunt*

Trespass,
detinue, and
trover.

² Brooke's Abridg. *Action sur le case*, pl. 109.

ad manus), and he wasted them.”³ In the fourth year of Edward VI. we find the action in its modern form : “ Action on the case that the plaintiff was in possession of such and such goods *ut de propriis et illa perdidit et def. illa invenit et illa in usum proprium convertit.*”⁴

It is not to be supposed, however, that there was no remedy at all for a conversion before the invention of trover in the fifteenth century. Before this remedy was heard of, its work was doubtless done by detinue. For the defendant in detinue, charged with unjustly detaining the goods of the plaintiff, was not suffered to object that he had already converted and disposed of them, and therefore that he no longer detained them. In *Jones v. Dowle*⁵ this very defence was pleaded in detinue, and it was said by Parke, B. : “ Detinue does not lie against him who never had possession of the chattel, but does lie against him who once had, but has improperly parted with the possession of it.” So in *Reeve v. Palmer*⁶ it is said : “ All the authorities from the most ancient time show that it is no answer to an action of detinue, when a demand is made for the redelivery of the chattel, to say that the defendant is unable to comply with the demand by reason of his own breach of duty.” This being so, it is clear that detinue was available as a remedy for wrongful conversion as well as for wrongful detainer. Why, then, was the new remedy of trover invented ? The answer is to be found in the fact that detinue was an exceedingly unsatisfactory form of action, for the defendant had the right of defending himself by wager of law, a form of licensed perjury which reduced to impotence all proceedings in which it was allowable. The ingenuity of pleaders, therefore, was devoted to avoiding all forms of action in which wager of law was admitted, and to inventing other forms of action which should take their place, and in which a plaintiff might have the benefit of the verdict of a jury. Hence the action of trover as a remedy for conversion. Conversion came to be treated for the first time as an independent wrong—a quasi-trespass, to be sued for in a special form of trespass on the case. It was no longer treated as a mere incident of a wrongful detention, to be sued for in the action of detinue. For trespass on the case led

Reasons for
the invention
of trover.

³ *Ibid.*, pl. 103.

⁴ Brooke's Abridg. *Action sur le case*, pl. 113.

⁵ (1841) 9 M. & W. 19.

⁶ (1858) 5 C.B. (N.S.) at p. 91.

to the verdict of a jury on a plea of not guilty, and a plaintiff might hope for justice ; but detinue led to nothing but defeat by the defendant's wager of law. Just as *indebitatus assumpsit* was substituted for debt, so trover was substituted for detinue.

4. The declaration in trover was simply a variant of the declaration in detinue, the only material difference being that in trover the defendant was charged with wrongly converting the property to his own use, while in detinue he was charged with unjustly detaining it. Detinue was of two kinds, distinguished as *detinue sur bailment* and *detinue sur trover*. The former was the appropriate remedy when the property had come to the defendant's hands by a bailment or contract between the parties. The latter, or *detinue sur trover*—which is not to be confounded with the action of trover itself—was appropriate when the defendant had found the goods, or indeed had come by them in any other fashion save by contract with their owner. These allegations of bailment or finding were, however, immaterial and untraversable.⁷ It mattered nothing in what manner the defendant had obtained possession of the property. Indeed the older mode of pleading was to make no allegation in the matter, save that the goods of the plaintiff had come to the defendant's hands (*devenerunt ad manus*) and were unjustly detained by him. In Y.B. 33 Hen. VI. 27, pl. 12, we find an action of detinue *sur trover* in which the specific allegation of finding (declaration *per inventionem*) is criticised as a novelty. The only issues were whether the goods were the property of the plaintiff, and whether the defendant unjustly detained them.

The form of declaration in trover.

The action of trover and conversion was modelled upon that of detinue *sur trover*. The plaintiff alleged in his declaration (1) that he was possessed of certain goods *ut de bonis propriis*, (2) that he casually lost them and that the defendant found them, and (3) that the defendant did not restore them, but wrongfully converted them to his own use. As in detinue, so in trover, this second allegation as to losing and finding was

⁷ Brooke's Abridg. *Detinue*, pl. 50 ; *Gledstane v. Hewitt*, 1 C. & J. 565 ; Chitty's Pleading, i. 138, 7th ed. For the form of declaration, see Chitty's Pleading, ii. 428.

in most cases a mere fiction ; in any case it was immaterial and untraversable. Nor was it ever essential. The plaintiff might have alleged a bailment instead of a loss and finding, thus modelling his declaration on detinue *sur bailment* instead on detinue *sur trover*. In *Gumbleton v. Grafton*⁸ such a declaration in trover was objected to, but held good. Or a general allegation of *devenerunt ad manus defendantis* would have been good enough. It must not be supposed that the action of trover was specially or originally designed to meet the case of an actual loss and finding. The allegation of loss and finding was from the *beginning* merely a form of pleading imitated from the action of detinue.

Extension
of the scope
of trover.

5. Such, then, was the origin of the action of trover, and so far as we have gone with the story, the matter stands thus. There are three modes in which a man may be deprived of his property, and three corresponding forms of action provided for his relief. If his property is wrongfully taken, he may sue in trespass ; if it is wrongfully detained, he may sue in detinue ; and if it is wrongfully converted, he may sue either in detinue, as was the older practice, or in trover in accordance with the new. No sooner, however, has trover become thus established than it begins to extend its boundaries, and it very rapidly succeeds in appropriating almost the whole territory both of trespass and of detinue. It becomes a universal remedy applicable in all cases in which a plaintiff has been deprived of his goods, whether by way of taking, by way of detention, or by way of conversion in its proper and original sense. In every case of wrongful taking the plaintiff might elect between trespass and trover, and in every case of detention he might elect between detinue and trover. We have now to see how this extension was effected.

Conversion
by detention.

6. *Conversion by Detention. Trover and Detinue.* It is clear that a mere detention is not a conversion in the original sense. Just as a man cannot eat both his cake and have it, so he cannot convert another's goods to his own use and at the same time detain them. Nevertheless it was settled at an early date in the history of trover that a neglect or refusal to deliver up a chattel, after demand made, is *evidence* of a

⁸ Cro. Eliz., 781.

conversion—evidence, that is to say, that the defendant has already made away with the property and therefore cannot and does not restore it. Moreover, this evidence was received as *sufficient and conclusive*, in the absence of any proof that the failure to deliver was justified. The defendant was not suffered to prove that, although he had unlawfully refused to deliver up the property, he had not converted it but still retained it. Juries were directed as a matter of law to find a conversion on proof of demand and refusal without lawful justification. Blackstone,⁹ speaking of a finder of goods says: "He must not convert them to his own use, which the law presumes him to do if he refuses to restore them to the owner." So in *Alexander v. Southey*¹⁰ Best, J., says: "An unqualified refusal is almost always conclusive evidence of a conversion." So in Coke's Reports:¹¹ "If *A* brings an action on the case against *B* upon trover and conversion of plate, jewels, &c., and the defendant pleads not guilty, now it is good evidence *prima facie* to prove a conversion, that the plaintiff requested the defendant to deliver them and he refused, and therefore it shall be presumed that he has converted them to his use."¹²

So soon as this rule has been established, it is clear that trover has passed beyond its original scope, and has become concurrent with detinue; these two forms of action have now become alternative remedies. For every detention after demand made is now become a constructive or fictitious conversion—a conversion in law, though not in fact¹³—on which the plaintiff may bring his action of trover if he will, and so avoid the disadvantages inherent in detinue.

This doctrine that a detention after demand is merely evidence of a conversion, and not a conversion itself, is often

Detention not now mere evidence of conversion.

⁹ Comm. iii. 153.

¹⁰ (1821) 5 B. & Ald. p. 250; 24 R.R. p. 350.

¹¹ X. 56 b.

¹² See for what is perhaps the earliest case in which the rule was laid down, *Eason v. Newman*, Cro. Eliz., 495.

¹³ In *Alexander v. Southey* (5 B. & Ald. 247; 24 R.R. 348) Abbot, C.J., says: "*Perkins v. Smith* and *Stephens v. Elwall* were both cases of *actual conversion* by servants in disposing of goods the property of others to their master's use; but here the question is whether the refusal of the servants to deliver the goods in question amounts to a conversion of the property. This, therefore, is the case of a *conversion arising by construction of law*."

set forth as a subsisting rule of law even at the present day. We read in one of the most recent textbooks on the law of torts :¹⁴ "The mere fact of a refusal in answer to a demand is never of itself a conversion, though it may be very strong evidence of it." Now that its historical basis has disappeared and been forgotten, however, such a statement is merely a source of complexity and confusion. It is necessary to acknowledge frankly that the term conversion is now used in a wide sense to mean any act by which another person is deprived of his property, and that to detain property without lawful justification is a conversion of it, no less than to destroy it or to make away with it. There is no reason for retaining in our modern law a distinction which was in its origin merely a pleader's device to justify the use of trover instead of detinue. Even in comparatively early times we find judges prepared to rationalise the law in this respect, and to eliminate the fictitious elements from the law of trover. Thus in *Baldwin v. Cole*¹⁵ Holt, C.J., says: "The very denial of goods to him that has a right to demand them is an actual conversion and not only evidence of it as has been holden." This view, however, did not prevail, although there was much conflict on the point.¹⁶

Negligent
loss of
chattels not
conversion.

Notwithstanding this extension of the original scope of trover there remained even to the last one respect in which the action of detinue was of wider application. Detinue was available not only when there was a real detention of a chattel (*i.e.*, a refusal to deliver it, while it still remained in the possession or power of the defendant) but also where the defendant was unable by his own fault to make delivery, whether this fault consisted in a wilful act of wrongful disposition or in mere negligence leading to the loss or destruction of the chattel. Thus a bailee who negligently allowed the goods to be stolen from him, or to be destroyed while in his possession, could be sued in detinue as for the detention of them.¹⁷ But

¹⁴ Clerk and Lindsell, p. 241, 4th ed.

¹⁵ 6 Mod. 212.

¹⁶ See *Eason v. Newman*, Cro. Eliz. 495; *Wilson v. Chambers*, Cro. Car. 262; *Mires v. Solebay*, 2 Mod. 242; 10 Co. Rep. 56 b; *Isack v. Clarke*, 1 Rolle 126.

¹⁷ *Jones v. Dowle*, (1841) 9 M. & W. 19; *Reeve v. Palmer* (1858) 5 C.B. (N.S.) 84.

he could not be sued in trover as for a conversion, for there was no conversion unless he had wilfully disposed of the property (as by delivering it to another person) or unless he refused to deliver it on request while he still had it in his possession.¹⁸

7. *Conversion by Taking. Trover and Trespass.* We have now seen how the new remedy of trover was extended to cover the ground of detinue, and it remains to notice the process by which it became concurrent with trespass *de bonis asportatis* also. The allegations of loss and finding being immaterial and untraversable, it mattered nothing in what way the property came to the defendant's hands. Whether it was by bailment or by finding or by tortious taking was irrelevant, if an actual or constructive conversion could be proved. Therefore when goods were taken and converted, the plaintiff had an election either to sue in trespass for the taking, or, waiving the trespass, to sue in trover for the conversion. This was settled, not indeed without difficulty, in the case of *Bishop v. Viscountess Montagu* :¹⁹ "Although trespass lies, yet he may have this action if he will, for he hath his election to bring either." So in *Kinaston v. Moore* :²⁰ "The losing is but a surmise and not material, for the defendant may take it in the presence of the plaintiff or any other who may give sufficient evidence, and although he take it as a trespass, yet the other may charge him in an action upon the case on a trover if he will." In *Cooper v. Chitty* ²¹ Lord Mansfield says of the action of trover : "In form it is a fiction, in substance a remedy to recover the value of personal chattels wrongly converted by another to his own use. The form supposes the defendant may have come lawfully into the possession of the goods. The action lies and has been brought in many instances where in truth the defendant has got the possession lawfully. When the defendant takes them wrongfully and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass and admits the possession to have been lawfully gotten." So it has been said : "Whenever trespass for taking

¹⁸ *Williams v. Gesse* (1837) 3 Bing. N.C. 849 ; 43 R.R. 822.

¹⁹ Cro. Eliz. 824 ; Cro. Jac. 50.

²⁰ Cro. Car. 89.

²¹ 1 Burr. p. 31.

goods will lie, that is, where they are taken wrongfully, trover will also lie.²²

When trover is thus brought for what is in truth a trespass, the unlawful taking is itself sufficient and conclusive proof of a conversion, or, in other words, it amounts in itself to a sufficient *constructive* conversion to enable the action to be maintained without any further proof that the defendant converted the goods in fact. He who wrongfully took another's goods would not be permitted to deny that he had also converted them, and he was in the same position in this respect as he who detained them after a request. //Nor was any request of restoration needed when the taking was unlawful// It was only when a defendant came lawfully into possession of the property, that a demand and refusal was a condition precedent to the right of suing in trover. Thus it is said²³: "Where the possession is lawful, the plaintiff must show a demand and refusal, to make a conversion. But if the possession was tortious, as if the defendant takes away the plaintiff's hat, there the very taking is a sufficient proof of the conversion."

Had the law developed logically it would have maintained to the end the position that an unlawful taking is merely evidence of a conversion, just as an unlawful detention is. This, however, was not so. At an early period we find it said without scruple or qualification that a tortious taking is a conversion,²⁴ although to this day we continue to say of a tortious detainer that it is merely *evidence* of a conversion. This is an obvious lapse both from the history and the logic of the matter. If we use the term conversion in its original and strict sense, it is clear that neither a taking nor a detention is anything more than evidence; each amounts at the most to a constructive conversion, a conversion in law though not in fact. While if we adopt the wider sense, and mean by conversion any deprivation of property, it is clear that both a taking and a detention are actual conversions, if there is no lawful justification for them, and that there is no distinction to be drawn between them. To say that taking is a conversion,

²² *Wilbraham v. Snow*, 2 Wms. Saund. 47 aa. See also Chitty's Pleading, i. 172, 7th ed.

²³ 3 Salk. 365.

²⁴ See, for example, *Bruen v. Roe*, 1 Sid. 264.

but that detention is merely evidence of one, is to use the term conversion in two diverse senses, its old and its new ; it is to retain the old historical theory of trover in one case, and to abandon it in the other.²⁵

8. Such, then, is the history of trover and of its relations to the earlier actions of trespass and detinue. We now proceed to consider systematically the modern law of conversion, which may be conveniently set forth in the form of the following series of rules.

²⁵ There is one decision, viz., *Fouldes v. Willoughby* (1841) 8 M. & W. 540, 58 R.R. 803, which is in conflict with the proposition that every wrongful taking of a chattel amounts to a conversion of it. It is there laid down that a wrongful taking is not a conversion (although it is, of course, a trespass) unless it is done with the intent to deny the plaintiff's title to the property, and so amounts to the setting up of an adverse claim on behalf of the defendant or some third person. "It has never yet been held," it is said in the judgment of Abinger, C.B., "that the single act of removal of a chattel, independent of any claim over it either in favour of the party himself or any one else, amounts to a conversion of the chattel." The facts of the case were that the defendant wrongfully removed from his ferry-boat certain horses belonging to the plaintiff and turned them loose on shore, whereby they were ultimately lost to the plaintiff. It was held that the plaintiff had no cause of action in trover, but ought to have sued in trespass. As to this case the following observations may be made.

- (a) The distinction thus drawn between a cause of action in trespass *de bonis asportatis* and a cause of action in trover was a novelty in the law, being unsupported, it is believed, by any previous decision. All the older authorities are to the effect that in case of tortious asportation, trover and trespass are alternative remedies.
- (b) The suggestion that every conversion involves a denial of the plaintiff's title and the setting up of an adverse claim on behalf of the defendant or some third party is inconsistent with later cases, such as *Hiorst v. Bott* (1874) L.R. 9 Ex. 86, in which the defendant was held liable in trover for causing the loss of property through intermeddling with it, although his sole object in so doing was to restore it to the plaintiff himself.
- (c) Even if this distinction between trover and trespass formerly existed, there is no reason, now that forms of action are abolished, for perpetuating the remembrance of it in the law of conversion. It never was more than a technicality of pleading. Any wrongful asportation of chattels, resulting in the loss of them, to the plaintiff, admittedly gave a cause of action for the value of them, and there is no reason at the present day why this cause of action, even if formerly trespass exclusively, should not now be included within the definition of conversion.

§ 98.—Conversion Defined.

Conversion
in general.

RULE 1.—*A conversion is the act of wilfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.*

No conver-
sion without
wilful
interference

1. In order to amount to conversion the act done with respect to the chattel must have been one of wilful and wrongful interference. He who so interferes with a chattel acts at his own risk, and if the loss of the chattel does in fact (whether intended or not) result from his act, he is liable for the value of it in an action of trover. In the absence, however, of a wilful and wrongful interference there is no conversion, even if by the negligence of the defendant the chattel is lost or destroyed. Thus a carrier or other bailee who by accident loses the goods entrusted to him was by the old practice not liable in trover, but merely in detinue, case, or assumpsit.¹ But if he wrongfully and mistakenly delivered the chattel to the wrong person, or refused to deliver it to the right person, he could be sued as for a conversion. This distinction is not a mere matter of form or a technicality of the old law of procedure, but a subsisting principle of modern substantive law.

Mistake no
defence.

2. Although a conversion is necessarily an intentional wrong in the sense already explained, it need not be knowingly wrongful. A mistake of law or fact is no defence to anyone who intentionally interferes with a chattel. He does so *suo periculo*, and takes the risk of the existence of a sufficient lawful justification for the act; and if it turns out that there is no justification, he is just as responsible in an action of trover, as if he had fraudulently misappropriated the property. "Persons deal with the property in chattels or exercise acts of ownership over them at their peril."² Thus an auctioneer, who honestly and ignorantly sells and delivers property on behalf of a customer who has no title to it, is liable for its value to the true owner, even though he has already paid the proceeds of the sale to his own client.³ So in the leading case of *Hollins v. Fowler*⁴ the defendant, a cotton broker, honestly

¹ *Williams v. Gesse* (1837) 3 Bing. N.C. 849, 43 R.R. 822.

² *Hollins v. Fowler* (1874) L.R. 7 Q.B. p. 639, *per* Cleasby, B.

³ *Consolidated Co. v. Curtis* (1892) 1 Q.B. 495; *Barker v. Furlong* (1891) 2 Ch. 172.

⁴ (1875) L.R. 7 H.L. 757.

purchased from a person who had obtained possession of it by fraud certain cotton belonging to the plaintiff, and forthwith sold and delivered it to a manufacturer, receiving merely a broker's commission on the transaction. On being sued in trover by the true owner, the broker was held by the House of Lords to have no defence and to be liable for the full value of the property.

3. If the defendant has thus intentionally interfered with a chattel without lawful justification, and a loss of the chattel does in fact result from the interference, it is no defence that such a loss was not intended, or even that it was not the natural or probable result of the defendant's act. The doctrine of remoteness of damage has no application to the wrong of conversion, so long as no damages are claimed beyond the value of the property.⁵ The question is not whether the defendant intended to deprive the plaintiff of his property, or whether he knew or ought to have known of the probability of such a result, but merely whether his wrongful interference did as a matter of fact produce that result. In *Hiort v. Bott*⁶ the plaintiffs, by a mistake fraudulently induced by their own agent, consigned certain barley to the defendant which he had not ordered, and they sent him a delivery order to enable him to obtain it from the carrier. The plaintiff's agent thereupon informed the defendant that the consignment was a mistake, and induced him to endorse and hand over the delivery order to him, the agent, in order that the goods might be obtained by him from the carrier and redelivered to the plaintiffs. The agent thus obtained possession of the barley, sold it, and absconded with the proceeds; and the defendant was held liable in trover for its value.⁷

Remoteness
of damage
no defence.

4. It is not necessary that the defendant should have acted on his own account, or have converted the goods to his own use. He is equally liable if he has acted on behalf of some other person, as his agent or servant. In *Stephens v. Elwall*⁸ a servant was held liable for dealing with goods for

Defendant
need not
have acted
on his own
account.

⁵ *Supra*, p. 112.

⁶ (1874) L.R. 9 Ex. 86.

⁷ *Sed qu.* whether there was any act of wrongful interference in this case at all. Is not an involuntary bailee entitled to return the goods, and does he owe any duty to the owner save one of reasonable care?

⁸ (1815) 4 M. & S. 269; 16 R.R. 458.

his master's benefit and under his master's orders. "The clerk," it is said,⁹ "acted under an unavoidable ignorance and for his master's benefit, when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it." Even when the act is done on behalf of the true owner and with the honest intention of preserving or restoring the property, it will amount to a conversion if done without lawful justification, and if it results in fact in a loss of the property: as if I find A's goods which I wrongfully believe to have been lost or mislaid by him, and hand them to B to take to A, and B misappropriates them.¹⁰

Loss need
not be
permanent

5. The loss or deprivation of possession suffered by the plaintiff need not be permanent. "Conversion," it has been said,¹¹ "consists in any tortious act by which the defendant deprives the plaintiff of his goods either wholly or but for a time." The duration of the dispossession is relevant with respect to the measure of damages, but makes no difference in the nature of the wrong. In *Baldwin v. Cole*¹² the chattels were wrongfully taken and then tendered again to the plaintiff, and Holt, C.J., says:—"Here if the plaintiff had received them upon the tender, notwithstanding the action would have lain upon the former conversion, and the having of the goods after would go only in mitigation of the damages."

6. The six rules next following indicate the different modes in which a conversion, as defined in the present rule, may be committed.

§ 99.—Conversion by Taking.

RULE 2.—*Every person is guilty of a conversion who, without lawful justification, takes a chattel out of the possession of any one else.*

Every
wrongful
taking a
conversion

1. "The taking and carrying away of another's goods is a conversion. . . . Wherever trespass for taking goods will lie . . .

⁹ 4 M. & S. p. 261.

¹⁰ See also *Consolidated Co. v. Curtis* (1892) 1 Q.B. 495; *Barker v. Furlong* (1891) 2 Ch. 172; *Cochrane v. Rymill* (1879) 40 L.T. 744.

¹¹ Chitty's Precedents in Pleading, 662, 3rd ed.

¹² 6 Mod. 212.

trover will also lie."¹ He who takes possession of a chattel is liable for its value, unless he restores it; and even if he does restore it, he is liable for any loss suffered by the plaintiff in consequence of the temporary dispossession. It is no defence that restoration has become impossible, even though no permanent taking was intended, and even though the impossibility has resulted from no act or default of the defendant, but solely through the loss or destruction of the property by some inevitable accident or the wrongful act of some third person. For he who wrongfully takes possession of another's goods has them at his own risk, and must in all events either return them or pay for them.²

2. We have already considered the suggestion in *Fouldes v. Willoughby*³ that a taking is not a conversion unless it amounts to a denial of the plaintiff's title to the goods, and we have seen that even if this was once the law, it is a distinction which no longer calls for any recognition. For every taking was at all events a trespass, creating exactly the same liability to pay or restore which is created by a taking which amounted to a conversion. The distinction therefore related merely to the form of action and not to the substantive law, and is accordingly now obsolete.

§ 100.—Conversion by Detention.

RULE 3.—*Every person is guilty of a conversion who, without lawful justification, detains a chattel adversely to him who is entitled to the possession of it.*

1. The detention of a chattel amounts to a conversion, only when it is adverse to the owner or other person entitled to possession. That is to say, the defendant must have shown an intention to keep the thing in defiance of the plaintiff. Merely to be in possession of a chattel without title is not a conversion, nor indeed is it a tort of any kind. Thus if a bailee merely holds over after the end of the period for which

Detention no conversion unless adverse.

¹ *Wilbraham v. Snow*, Wms. Saund. II. 47 n. 47aa. *Norman v. Bell* (1831) 2 B. & Ad. p. 192, *per* Parke, J.: "A plaintiff may always bring an action of trover where an action of trespass *de bonis asportatis* would lie."

² *Supra*, p. 295.

³ (1841) 8 M. & W. 540; 58 R.R. 803. *Supra*, p. 293.

the chattel was bailed to him, he may be liable for a breach of contract, but he is not guilty of conversion or of any other tort. He has not deprived the owner of the possession, for there is nothing to show that the plaintiff may not have the chattel again whenever he desires it. So he who finds a chattel lost cannot be sued for a conversion, however long he keeps it, unless by refusing to give it up or in some other way he shows an intention to detain it adversely to the owner. No one is bound, save by contract, to take a chattel to the owner of it; his only obligation is not to prevent the owner from getting it when he comes for it.

This rule is not a mere peculiarity of the action of trover, for it is equally applicable to all forms of action in tort which are based on the detention of a chattel. Thus in *Clements v. Flight*¹ it was applied to the action of detinue. There the court distinguished between three possible meanings of the term *detain* in a declaration in detinue: viz., (1) the mere act of having the goods in the defendant's possession, (2) the mere omission to deliver, in the sense of taking the goods to the plaintiff, and (3) the act of withholding the goods and preventing the plaintiff from obtaining possession of them. "We are satisfied that the last is the true meaning of the word detain. If it meant the mere keeping a possession, not adverse, how could such a possession form the ground of an action? If it meant that the defendant had omitted and still omitted to be active in bringing the goods to the plaintiff, the action could not be maintained without showing an obligation by contract to do so. We have no doubt, therefore, that the detention complained of is an adverse detention."²

Demand and refusal.

2. The usual method of proving that a detention is adverse within the meaning of this rule is to show that the plaintiff demanded the delivery of the chattel, and that the defendant refused or neglected to comply with the demand. "It is common learning that where the goods came into the defendant's possession by delivery or finding, the plaintiff must demand them and the defendant refuse to deliver them, in order to constitute a conversion."³ It is submitted, how-

¹ (1846) 16 M. & W. 42, 73 R.R. 421.

² 16 M. & W. p. 49.

³ Wms. Saund. II. 47 i.

ever, that demand and refusal is not the sole method in which an adverse detention may be proved. There may be cases in which the making of a demand is impracticable, and it cannot be supposed that in such circumstances the owner of the goods is without a remedy. Presumably any conduct of the defendant which shows that he not merely possesses the goods, but intends to hold them in defiance of the plaintiff, and to deprive him of the possession of them, is sufficient to constitute a conversion, even though there has been no formal demand of restitution. Moreover, it is to be remembered that when the defendant is in possession by means of an unlawful taking of the goods out of the plaintiff's possession, this is in itself a conversion, and the plaintiff is not bound to rely on the detention, or to prove by demand and refusal or otherwise that it is adverse.⁴

3. Adverse detention does not necessarily involve any knowledge of the plaintiff's title. Detention under an honest but mistaken claim of right on the part of the defendant is just as much a conversion as a fraudulent purpose to keep another's property is. Where, however, there is a genuine doubt in the defendant's mind as to the ownership of chattels, a temporary and provisional refusal to deliver them to a claimant, pending inquiries into his title, is justifiable, and is neither a conversion nor any other kind of wrong. No person is bound to deliver forthwith to the first claimant on peril of being sued for a conversion. In such cases it is a question of fact for a jury, whether there was an honest doubt as to the title, and whether the delay was reasonably required for the purpose of making the needful inquiries.⁵

Delay due to
doubt as to
title.

4. A failure to deliver up goods on demand is not a conversion, if at the time of the demand they are no longer in the

Chattel must
be in defen-
dant's pos-
session.

⁴ *Supra*, p. 292. Wms. Saund. II. 47, n.

⁵ *Vaughan v. Watt* (1840) 6 M. & W. p. 497, 55 R.R. p. 716: "The learned judge was incorrect in telling the jury that the mere refusal to deliver the goods to the real owner was a conversion. . . . It ought to have been left to the jury whether the defendant had a bona fide doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed." See also *Alexander v. Southey* (1821) 5 B. & Ald. 247, 24 R.R. 348; *Pillott v. Wilkinson* (1864) 3 H. & C. 345; *Burroughes v. Bayne* (1860) 5 H. & N. 296.

power or possession of the defendant : as when they are already destroyed or consumed, or have already got into the possession of some other person. No one can convert a chattel by refusing to give it up when he no longer has it, and this is so even if it is due to his own act or default that delivery is no longer possible.⁶ If by his own wilful act he has already destroyed or consumed the property or disposed of it to some other person, he is indeed liable in trover ; but the conversion to be sued on in such a case is the very act of destruction, consumption, or disposal, and not the subsequent omission to give delivery to the plaintiff. Therefore it is from the date of this prior act, and not from that of the demand, that the statute of limitations begins to run in the defendant's favour.⁷ If, on the other hand, the defendant's inability to comply with the demand is due not to any wilful act of wrongful interference, but merely to negligence, as when the goods have been accidentally lost or destroyed while in his possession, he is not liable for a conversion at all ; not for the loss or destruction, because it was not the result of any wilful and wrongful interference, and not for the omission to deliver, for it is no proof in these circumstances of any adverse detention. If he is liable at all, it is in an action for negligence, provided that he was in possession of the goods under such circumstances that he owed to the owner of them a legal duty to take care of them. Finally, if the goods are lost or destroyed without any act or negligence of the defendant at all, and before by demand and refusal or otherwise his possession has become adverse and actionable, he is not liable at all, either for a conversion or on any other ground.

§ 101.—Conversion by Wrongful Delivery.

RULE 4.—*Every person is guilty of a conversion who, without lawful justification, deprives a person of his goods by delivering them to someone else.*

Wrongful
delivery.

Examples of this form of conversion have been already considered by us. Thus a bailee commits a conversion who sells or pledges the goods to a third person. So with a finder

⁶ *Williams v. Gesse* (1837) 3 Bing. N.C. 849 ; 43 R.R. 822.

⁷ *Granger v. George* (1826) 5 B. & C. 149 ; 29 R.R. 196.

of goods who similarly makes away with them. So an auctioneer, who sells and delivers stolen property or property subject to a bill of sale, is liable to the true owner or to the bill of sale holder, even though ignorant of any such adverse title, and even though he has already paid over the proceeds to his own client.¹ So a purchaser of goods from a vendor who has no title to them is liable in trover for their full value, if he subsequently resells and delivers them to another person.² So a servant or agent in possession of goods, who delivers them to a purchaser by order of his master or principal, commits a conversion against the true owner.^{3 4}

§ 102.—Conversion by Wrongful Disposition.

RULE 5.—*Every person is guilty of a conversion who, without lawful justification, deprives a person of his goods by giving some other person a lawful title to them.*

1. There are certain cases in which a person in possession of goods to which he has no title can nevertheless efficiently, though wrongfully, so dispose of them by sale, pledge, or otherwise, that he confers a good title to them on some one else. Any such disposition amounts to a conversion as against the true and original owner, for by the creation of this adverse title he has been deprived of his property. This is the case, for example, with a sale in market overt;⁵ with a wrongful disposition made by a mercantile agent under the provisions

Wrongful
disposition.

¹ *Consolidated Co. v. Curtis* (1892) 1 Q.B. 495; *Barker v. Furlong* (1891) 2 Ch. 172; *Cochrane v. Rymill* (1879) 40 L.T. (N.S.) 744.

² *Hollins v. Fowler* (1875) L.R. 7 H.L. 757.

³ *Stephens v. Elwall* (1815) 4 M. & S. 259; 16 R.R. 458.

⁴ It is to be remembered, however, that when a carrier, warehouseman, or other bailee dealing with goods under a contract with their owner, delivers them by mistake to the wrong person, his liability for this mistake depends not on the law of torts and of conversion, but on that of contracts. Whether he is bound to deliver, at his peril, to the right person, or is bound only to exercise due care in making a delivery depends upon the express or implied terms of the contract. Ordinarily the duty of a carrier is merely to use reasonable care to deliver to the right person in accordance with the usual course of of business. *Stephenson v. Hart* (1828) 4 Bing. 476; *Heugh v. London & N.W. Ry. Co.* (1870) L.R. 5 Ex. 51; *McKean v. McIvor* (1870) L.R. 6 Ex. 36.

⁵ Sale of Goods Act, 1893, s. 22.

of the Factors Act, 1889; with a wrongful disposition made by a vendor or purchaser of goods who retains or obtains possession of them;² and with any wrongful act which creates a good title to a negotiable instrument, adverse to the right of the original owner. In most of such cases, indeed, the wrongful disposition is also a wrongful delivery, and therefore is a conversion for that reason also, but this coincidence is not essential.

2. A mere sale or other attempted disposition unaccompanied by delivery and ineffectual to divest the plaintiff's title to the property is not a conversion.³

§ 103.—Conversion by Wrongful Destruction.

RULE 6.—*Every person is guilty of a conversion who, without lawful justification, wilfully consumes or otherwise destroys a chattel belonging to another person.*

Wrongful
destruction.

One mode of depriving the owner of the use and possession of his property is to destroy it; therefore if this is done intentionally, the act amounts to a conversion.¹ Mere damage, however, which falls short of actual destruction, is not in itself a conversion. The test of destruction, as opposed to mere damage, is presumably the disappearance of the identity of the article. Grapes are presumably destroyed when they are turned into wine, cotton when it is woven into cloth, corn when it is ground into flour.

§ 104.—Other Forms of Conversion.

RULE 7.—*Every person is guilty of a conversion who in any other way than those mentioned in the preceding rules causes the loss of a chattel by any act of wilful interference without lawful justification.*

Miscellaneous
forms of
conversion.

This is a residuary class of conversions which includes all modes of wrongful interference and loss except taking, detention, delivery, disposition, and destruction. Thus in *Lilley*

¹ *Ibid.* s. 25.

² *Lancashire Waggon Co. v. Fitzhugh* (1861) 6 H. & N. 502; *Barker v. Furlong* (1891) 2 Ch. at p. 181; *Consolidated Co. v. Curtis* (1892) 1 Q.B. at p. 498.

³ *Com. Dig.* Action upon the case, *Trover, E.*; *Hollins v. Fowler* (1875) L.R. 7 H.L. p. 768.

v. *Doubleday*¹ the defendant, a warehouseman, received the plaintiff's goods for deposit in a certain warehouse. In breach of his agreement he stored them in a different building, which was burned down while the goods were in it, and he was held liable for the loss of them. There was no negligence in so keeping the goods, their loss was in no way a natural or probable result of his breach of contract, yet by reason of his wrongful interference with them they were at his risk. So he who without lawful justification lets loose another's dog from his chain, or opens the cage in which another keeps a bird, or frightens another's cattle so that they escape from the place in which they are kept, is liable for any loss of the property which so results.

§ 105.—Acts not amounting to Conversion.

RULE 8.—*The following acts do not in themselves amount to a conversion :—*

(a) *To receive goods in good faith by way of purchase, pledge, bailment, or otherwise, from a person who has no title to them, even though that person commits a conversion in so delivering them.*

(b) *To redeliver goods in good faith to a person from whom possession has been received, or to his order (? unless in this last case the defendant knowingly takes part in some sale, pledge, or other transaction, purporting to transfer a title to the goods).*

1. We have already seen that the mere possession of goods without title is neither a conversion nor any other kind of tort.² The only detention that is actionable is adverse detention—a withholding of possession from the person entitled to it. It seems to follow logically from this, that merely to receive goods in good faith by the way of pledge, sale, or otherwise, from a person who has no title to them, is not a conversion by the recipient. He commits no conversion until he refuses to deliver them to the true owner, or until he wrongfully disposes of them. Thus in *Spackman v. Foster*³ certain deeds belonging to the plaintiff were fraudulently taken from

Mere receipt
of chattel not
a conversion.

¹ (1881) 7 Q.B.D. 510.

² *Supra*, p. 297.

³ (1883) 11 Q.B.D. 297.

him and pledged in the year 1859 with the defendant, who received them in good faith and in ignorance of the plaintiff's title. In the year 1882 the plaintiff discovered the loss of the deeds and demanded them from the defendant, who refused to give them up and pleaded the Statute of Limitations. It was held that no cause of action accrued until the demand and refusal, and that therefore the defendant was liable in trover although he had been in possession of the deeds for twenty-three years. "The defendant," says Grove, J.,³ "when he received these deeds had no knowledge that the person who pledged them had no title to them. He kept them as depositor or bailee, bound to return that on payment of the money he had advanced. He held them against the person who had deposited them, but not against the real owner: and *non constat* that he would not have given them up, if the real owner had demanded them. This does not seem to me to be conversion." A similar decision was come to on very similar facts in *Miller v. Dell*⁴ in which Lord Esher says: "Where title deeds are fraudulently taken from the rightful owners and deposited with a third person, until demand and refusal to give up the deeds to the real owners, they have no right of action against the third person against which the statute would run." Kay, L.J., quotes and adopts the reasoning of the passage just cited from the judgment in *Spackman v. Foster*.^{5 6}

No conversion if chattel merely restored to person from whom it was received.

2. If this is so, it seems further to follow that if he who thus innocently acquires possession of another's goods redelivers them to him from whom he got them, before he has received notice of the plaintiff's claim to them, he is free from responsibility. He has not deprived the plaintiff of his property, for that property is now in exactly the same position as if the defendant had never interfered with it at all. Accordingly in *Union Credit Bank v. Mersey Docks and Harbour Board*⁸ certain hogsheads of tobacco belonging to the plaintiffs

³ At p. 100.

⁴ (1891) 1 Q.B. 468.

⁵ *Ibid.*, p. 473.

⁶ It is submitted that the *dicta* to the contrary in *McCombie v. Davis* (1805) 6 East 538, 8 R.R. 534, and in *Fine Art Society v. Union Bank of London* 17 Q.B.D. at p. 711, must be taken to be incorrect in view of the decisions already cited.

⁸ (1899) 2 Q.B. 205.

were fraudulently pledged by a third person with the defendants by the delivery of the dock warrants. The defendants acted throughout in good faith, and subsequently returned the warrants to the pledgor on redemption. The plaintiffs thereafter demanded the property from the defendants and sued in trover, when it was held by Bigham, J., that they were not liable. "A warehouseman," says Blackburn, J., in *Hollins v. Fowler*,⁹ "with whom goods have been deposited is guilty of no conversion by keeping them or restoring them to the person who deposited them with him, though that person turns out to have no authority from the true owner."¹⁰

3. What shall be said, however, if the innocent holder has delivered the goods not to the person from whom he received them, but at his order to some third person : as when a carrier receives stolen goods from a consignor, and delivers them to the consignee ; or a warehouseman delivers such goods to him to whom the delivery warrant has been transferred by the depositor. If in such a case the defendant acts in good faith and without any knowledge that the delivery made by him is in pursuance of some sale or other disposition purporting to affect the title and not merely the possession of the goods, it is probable that he is under no liability. Blackburn, J., in *Hollins v. Fowler*¹¹ expresses this principle as follows : "I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle one who deals with goods at the request of the person who has the actual custody of them in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was the finder of goods or intrusted with their custody." On this principle a carrier who merely receives and delivers goods in the ordinary way is not liable in

Delivery to a third person.

⁹ (1875) L.R. 7 H.L. p. 767.

¹⁰ *Aliter* if he has notice of the claim of the true owner. He then delivers at his peril. *Winter v. Bancks* (1901) 84 L.T. 504

¹¹ (1875) L.R. 7 H.L. p. 766.

trover merely because the transaction was a conversion on the part of the consignor.¹²

If, however, a carrier, warehouseman, agent, or bailee has actual knowledge that his delivery of the goods is part of a transaction affecting the title and not merely the possession, the question of his liability would seem to be still an unsettled point in the law of conversion. If the case of *The National Mercantile Bank v. Rymill*¹³ is well decided, there is no liability even under these circumstances. In this case it was held by the Court of Appeal that an auctioneer with whom the goods of the plaintiff had been wrongfully deposited for sale was not liable for a conversion, although he had delivered them at the request of the vendor to a person to whom, as the auctioneer knew, the vendor had sold them by private contract. It is difficult to reconcile this decision with earlier cases such as *Stephens v. Elwall*,¹⁴ and it is contrary to the opinion of Blackburn, J., in *Hollins v. Fowler*.¹⁵ If well decided it is an authority for this principle: That a bailee commits no conversion, merely by redelivering the goods to his bailor or to the order of his bailor, even with the knowledge that the transaction is a sale or other disposition of the title, provided that he has no notice of any adverse claim on the part of the plaintiff. It is clearly otherwise, however, if the bailee has not merely delivered with knowledge of the sale, but has himself sold as well as delivered, even though he sells merely as an agent and without claiming any beneficial interest in the property for himself.¹⁶

§ 106.—Conversion by Estoppel.

RULE 9.—*A defendant who has in truth committed no conversion may be held liable for one, because he is estopped by his own act from alleging the fact which constitutes his defence :*

¹² *Greenway v. Fisher* (1824) 1 C. & P. 190; *Sheridan v. New Quay Co.* (1858) 4 C.B. (N.S.) p. 650, *per* Willes, J.; *Fowler v. Hollins*, L.R. 7 Q.B. p. 632, *per* Martin, B. See also *McEntire v. Potter* (1899) 22 Q.B.D. p. 441, *per* Cave, J.

¹³ (1881) 44 L.T. 767.

¹⁴ (1815) 4 M. & S. 259; 16 R.R. 458.

¹⁵ (1875) L.R. 7 H.L. at p. 767.

¹⁶ *Barker v. Furlong* (1891) 2 Ch. 172; *Consolidated Co. v. Curtis* (1892) 1 Q.B. 495. See the observations of Collins, J., in this case on the whole question.

for example, that he has never had possession of the goods, or that he is no longer in possession of them, or that the plaintiff has no title to them.

1. *Estoppel by representation.* Thus in *Seton v. Lafone*¹ Estoppel by representation. goods were deposited by A for safe custody with the defendant, a warehouseman, whose servants subsequently delivered them by mistake to a stranger. Thereafter in ignorance of this fact the defendant represented to B that he was still in possession of these goods on behalf of A, whereupon B purchased them from A and demanded delivery from the defendant. It was held that the defendant was estopped from denying that he had the goods, and he was accordingly held liable as for a conversion by refusing to deliver them.²

So in *Henderson v. Williams*³ the owner of goods in the defendant's warehouse was induced by the fraud of F to instruct the defendant to transfer them into the name of F. F then sold them to the plaintiff, who before paying for them obtained from the defendant an acknowledgment that they were now held on his account. On discovery of the fraud of F, the defendant at the request of the true owner refused to deliver the goods to the plaintiff, and defended an action of trover on behalf of the true owner and by his authority. It was held by the Court of Appeal that the defendant was estopped from disputing the plaintiff's title and was liable accordingly as for a conversion.

2. *Estoppel of a Bailee.* A bailee is estopped from denying Estoppel of a bailee, the title of his bailor, and therefore a refusal to redeliver the property is a conversion, even though in fact the plaintiff has no title to it.⁴ Nor does it make any difference whether the plaintiff has no title at the time of the bailment, or has lost his title since the bailment. Thus in *Rogers v. Lambert*⁵ the plaintiffs bought certain copper from the defendants and paid for it, but it remained in the defendants' possession as warehousemen for the plaintiffs. The plaintiffs then resold the

¹ (1887) 19 Q.B.D. 68.

² According to *Bristol and West of England Bank v. Midland Rly. Co.* (1891) 2 Q.B. 653, however, the defendant is equally liable in such a case even when there is no estoppel.

³ (1895) 1 Q.B. 521.

⁴ *Biddle v. Bond* (1865) 6 B. & S. 225.

⁵ (1891) 1 Q.B. 318.

copper to a third person, who paid them for it. The plaintiffs having thereafter demanded possession, the defendants refused to deliver on the ground that the plaintiffs had no longer any title to the copper. It was held, however, by the Court of Appeal that the defendants were estopped as bailees from raising any such defence, and that they were liable in trover for the full value of the property.

The estoppel of a bailee no longer exists, if he has already, on the demand of the true owner, given up possession to him, or if he defends the action on his behalf and by his authority. *

§ 107.—The Title of the Plaintiff.

RULE 10.—*Whenever goods have been converted, an action will lie at the suit of any person entitled at the time of the conversion to the immediate possession of them.*

Action by
person
entitled to
immediate
possession

The action of trover was based on the right of immediate possession, and not on the right of ownership. A person entitled to such possession could sue in trover, even though he was not the owner of the property but a mere bailee, agent, or pledgee.¹ Conversely a person not so entitled could not sue in trover, even though he was the owner of the property. Thus no action of trover would lie at the suit of a bailor of goods for a fixed term;² or at that of a purchaser of goods which were still held by the vendor under his lien;³ or at that of a pledgor, or of the holder of a bill of sale before default made by the debtor.⁴ In all such cases the remedy of the plaintiff was not trover, but a special action on the case for

* *Biddle v. Bond* (1865) 6 B. & S. 225. The remedy of a bailee against whom adverse claims are made is to take interpleader proceedings. *Robinson v. Jenkins*, 24 Q.B.D. 275; *Attenborough v. London & St. Katharine's Dock Co.* (1878) 3 C.P.D. 450.

The estoppel of a bailee is closely analogous to the rule that a possessory title is good against all but the true owner. It is possible, indeed, that the former rule is in truth merely a particular application of the latter. The true nature and extent, however, of the latter is still far from definitely settled, and it is necessary in the meantime to recognise the estoppel of a bailee as an independent principle.

¹ *The Winkfield* (1902) P. 42.

² *Gordon v. Harper* (1796) 7 T.R. 9; 4 R.R. 369.

³ *Lord v. Price* (1874) L.R. 9 Ex. 54.

⁴ *Halliday v. Holgate* (1868) L.R. 3 Ex. 299; *Donald v. Suckling* (1866) L.R. 1 Q.B. 585; *Bradley v. Copley* (1845) 1 C.B. 685.

the injury done to his reversionary interest, as we shall see under the next succeeding rule. A bailor at will, however, retained a sufficient right of immediate possession to enable him to sue even a stranger in trover.⁵

RULE 11.—*An action for a conversion will lie at the suit of a reversionary owner of chattels, or of any other person who had not at the time of the conversion any right of immediate possession, if he can prove that he has been prevented from the exercise and enjoyment of a right of future possession.*¹

Action by
reversionary
owner.

1. Although the remedy for an injury to a reversionary right in chattels was under the old practice not trover, but a special action on the case, there seems no sufficient reason at the present day why any such technicality should receive continued recognition. We include such injuries, therefore, under the name of conversion.²

2. A plaintiff entitled to immediate possession has a right of action in every case in which a conversion has been committed, but a reversioner cannot sue unless by reason of the conversion he has been actually deprived, permanently or temporarily, of the benefit of his reversionary interest. Thus he can sue if the chattel has been destroyed, or if it has been so disposed of that a valid title to it has become vested in a third person, as by sale in market overt. So also he can sue if, after his reversionary interest has fallen into possession, he is prevented from obtaining possession by reason of the previous act of conversion. But while his interest remains reversionary, he cannot sue merely because the chattel has been wrongfully taken or detained from him who is entitled to the immediate possession of it. For *non constat* that his reversionary interest will be in any way affected.³

⁵ *Manders v. Williams* (1849) 4 Ex. 339, 80 R.R. 588. A similar rule limited the application of the action of detinue (*Nyberg v. Handelaar* (1892) 2 Q.B. 202), and of trespass *de bonis asportatis* (*Ward v. Macaulay* (1791) 4 T.R. 489).

¹ *Tancred v. Allgood* (1859) 4 H. & N. 438; *Mears v. London & S.W. Rly. Co.* (1862) 11 C.B. (N.S.) 850; *Donald v. Suchling* (1866) L.R. 1 Q.B. at p. 611; *Halliday v. Holgate* (1868) L.R. 3 Ex. at p. 302; *Lancashire Waggon Co. v. Fitzhugh* (1861) 6 H. & N. 502.

² Cf. Pollock's Torts, p. 349, 7th ed.

³ Cf. the rules as to the rights of action possessed by reversionary owners of land. *Supra*, p. 280.

Remitter
to right of
immediate
possession.

3. It is to be remembered that in certain cases a person who has a merely reversionary interest is remitted to the right of immediate possession by the very act of conversion itself, which causes in certain circumstances a forfeiture and determination of the particular interest in possession. Thus if chattels are bailed for a fixed term by way of hiring, and the bailee sells them, he thereby determines the bailment; and the bailor accordingly becomes entitled to immediate possession and can therefore sue either the bailee himself or the purchaser in trover, and not merely for an injury to his reversionary interest.⁴ Whether a wrongful act does or does not thus determine a bailment depends on whether it is or is not a breach of some express or implied condition of the contract of bailment.⁵ In *Mulliner v. Florence*⁶ the plaintiff's goods were in possession of the defendant, an innkeeper, and rightly held by him under a lien for a debt incurred by a third person, who had brought them to the inn. The innkeeper sold them illegally, and it was held that the lien was thereby destroyed, and the plaintiff remitted to his right of immediate possession, and thereby entitled to sue the innkeeper in trover for the full value of the property without any allowance in respect of the debt.⁷ In *Donald v. Suckling*⁸ and *Halliday v. Holgate*,⁹ on the other hand, it was held that a pledge is not determined by a premature sale or improper sub-pledge, and that the pledgor therefore cannot maintain trover or detinue, until by payment or tender of the debt due by him he has entitled himself to immediate possession.¹⁰

- RULE 12.—*Mere de facto possession is, as against a stranger, a sufficient title to support an action for a conversion, and the defendant cannot plead the jus tertii, unless he defends on behalf and by the authority of the true owner, or has already made satisfaction to him.*

⁴ *Nyberg v. Handelaar* (1892) 2 Q.B. 202.

⁵ *Donald v. Suckling* (1866) L.R. 1 Q.B. p. 614, *per* Blackburn, J.

⁶ (1878) 3 Q.B.D. 484.

⁷ This was before the existence of the present statutory power of sale.

⁸ (1866) L.R. 1 Q.B. 585.

⁹ (1868) L.R. 3 Ex. 299.

¹⁰ These cases are inconsistent with the earlier decision in *Johnson v. Stear* (1863) 15 C.B. (N.S.) 330, in which trover (although only for nominal damages) was held to lie in similar circumstances.

1. "The law is," says Lord Campbell in *Jeffries v. Great Western Railway Co.*,¹ "that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person; for against a wrongdoer possession is a title." Thus in *Armory v. Delamirie*² a boy who found a jewel recovered its full value in trover from a jeweller to whom he offered it for sale and who refused to return it to him. So in *Bridges v. Hawkesworth*³ he who found a lost bundle of banknotes on the floor of a shop was held entitled to sue for their value the shopkeeper with whom he had deposited them for the purpose of discovering the owner.^{4 5}

Possessory title sufficient in trover.

2. The measure of damages in an action brought by a plaintiff having a merely possessory title is the same as if his title were a legal and perfect one.⁶ As against a stranger he is conclusively presumed to be the true owner, and therefore he has all the rights of one.

Measure of damages.

3. Presumably it makes no difference in what mode the plaintiff obtained the possession on which he relies. Whether honest or dishonest, it is a good title *adversus extraneos*.⁷

4. A possessory title once acquired probably continues to exist notwithstanding a loss of the possession by the wrongful act of a stranger. Thus if A finds goods, and they are taken

Duration of possessory title.

¹ (1856) 5 E. & B. p. 805.

² (1721) 1 Str. 505.

³ (1851) 21 L.J. Q.B. 75.

⁴ See also *Sutton v. Buck* (1810) 2 Taunt. 302, 11 R.R. 585; *The Winkfield* (1902) P. 42; *Glenwood Lumber Co. v. Phillips* (1904) A.C. 405.

⁵ *Title to goods found*. It is to be observed that the best title to goods found is not necessarily in him who finds them. In certain cases he is bound to give them up to some third person, for whom he is deemed to have found them. Thus a workman, agent, or servant finding goods in or on the property of his employer in the course of his employment cannot keep them against his employer: as if I engage a carpenter to open a locked box, and he finds money in it. See *South Staffordshire Water Co. v. Sharman* (1896) 2 Q.B. 44. So also if a trespasser finds goods belonging to A on the land of B.

⁶ *Armory v. Delamirie* (1721) 1 Str. 505; *The Winkfield* (1902) P. at p. 54.

⁷ *Buckley v. Gross* (1863) 3 B. & S. p. 574.

from him by B, and sold by B to C, it is probable that A has an action of trover not only against B, but also (after demand and refusal) against C also. At the time of C's conversion it is true, indeed, that A had no longer any subsisting possession, but he still retained the possessory title which he acquired through his former possession. In *Buckley v. Gross*⁸ Blackburn, J., says: "I do not wish to question that possession alone is sufficient as against a wrongdoer; and I am inclined to agree that a person having possession would have a right of action against a person who claims through a stranger, just as much as against the stranger himself."

5. A possessory title once acquired continues, although the possessory owner has delivered possession to a bailee, agent, or other person who holds the property on his behalf returnable at will. Thus if A finds goods, and deposits them with B, A has not merely a right of action against B, but also one against any other person who converts the property.⁹

6. What, then, shall be said, if the possessory owner, instead of merely bailing the goods at will, pledges them or bails them for a fixed term, or otherwise parts with the right to the immediate possession of them. Is his possessory title thus destroyed, or does it still subsist as a reversionary interest capable of protection by action against third persons? This has never been decided, but it is submitted on principle that there is no reason for any such distinction between a bailment at will and one for a term, and that a possessory title may become reversionary and yet subsist, just as a legal title may. If this is so, a possessory owner who pledges the property or bails it for a term has not merely a title by estoppel against his own pledgee or bailee, but a title valid against all persons except the true owner.

Destruction
of possessory
title.

7. When a possessory title thus subsists notwithstanding the absence of actual possession (as when the property is now in the possession of a wrongful taker or a bailee) it is probably destroyed by any act or event which would have destroyed it,

⁸ (1863) 32 L.J. Q.B. p. 131. See also *ibid.* p. 131, *per* Crompton, J.

⁹ *Bourne v. Fosbrooke* (1865) 18 C.B. (N.S.) 515; *Barker v. Furlong* (1891) 2 Ch. 172.

had it been a good legal title ; as for example, a sale of the property by the possessory owner, or his bankruptcy. Thus in *Richards v. Jenkins*¹⁰ A, the owner of chattels, let them to B at a rent, and became bankrupt. He concealed his ownership of the property from his trustee in bankruptcy, and continued to receive rent from B, who was ignorant of the bankruptcy. An execution creditor of B subsequently seized the goods, and A claimed them, the trustee in his bankruptcy not intervening. It was held by the Court of Appeal that the execution creditor was entitled to the goods as against A, and Fry, L.J., says¹¹ : "It seems to me clear that the claimant had at that time no property in the goods. At the utmost he had only a right by way of estoppel against the execution debtor. . . . The execution creditor is not a party or privy to the estoppel and is not bound by it." This was a case, therefore, in which the *jus tertii* was successfully set up against the claim of a person from whose bailee the defendant had taken the property. The defendant was permitted to say to the bailor : "Your title has determined since the bailment was made ; you are no longer in possession ; and any title (possessory or legal) which you formerly had has been divested by your bankruptcy."¹²

8. A possessory title is divested by any rightful disposition effected by or on the behalf of the true owner ; for example, the retaking of the property, or the attornment of the possessory owner's bailee to the true owner.¹³

9. Notwithstanding the foregoing rules as to possessory title, it seems clear that a defendant may plead the *jus tertii* When the *jus tertii* may be pleaded. in three cases :

(a) When he defends the action on behalf and by the authority of the true owner ;¹⁴

¹⁰ (1887) 18 Q.B.D. 451.

¹¹ At p. 458.

¹² The estoppel of a bailee, on the contrary, survives such determination of the bailor's interest, and in this respect at least the rule as to title by estoppel seems to be wider than the rule as to title by possession. *Rogers v. Lambert* (1891) 1 Q.B. 318. On the whole matter, however, the law is uncertain and undeveloped.

¹³ *Buckley v. Gross* (1863) 3 B. & S. 566. This case depends on the authority of the police to take possession of and deal with property suspected to have been stolen.

¹⁴ *Biddle v. Bond* (1865) 6 B. & S. 225.

- (b) When he committed the act complained of by the authority of the true owner ;
- (c) When he has already made satisfaction to the true owner, either by returning the property to him or by paying him the value of it.

Effect of satisfaction made to possessory owner.

10. Payment of the value of the property to a merely possessory owner, even in pursuance of a judgment and by compulsion of law, is no defence to a subsequent action by the true owner.¹⁵ But it is to be presumed that if by reason of this rule a defendant has been compelled to pay twice for a conversion committed by him, he will have a right of action against the possessory owner for repayment of the amount so received by him.

As we have already seen, if the defendant, instead of paying damages at the suit of a possessory owner, restores the chattel to him without notice of any adverse claim, this is no conversion, and he incurs no liability to the true owner.¹⁶ Moreover a defendant sued by a possessory owner may protect himself against an adverse claim by taking interpleader proceedings.¹⁷

§ 108.—Conversion and the Limitation of Actions.

RULE 13.—*When the defendant has once converted the plaintiff's property, a second conversion or other wrongful act subsequently done by him to the same property while it remains in his possession, does not amount to a new cause of action for the purpose of the limitation of actions.*

Successive conversions by the same person.

1. It often happens that two or more successive acts of conversion are committed by the same person in respect of the same property. The defendant, for example, wrongfully takes a chattel, and on a subsequent date wrongfully consumes it, or refuses to restore it on demand. From what date in

¹⁵ *Attenborough v. London & St. Katharine's Dock Co.* (1878) 3 C.P.D. p. 454, *per* Bramwell, B.

¹⁶ *Supra*, p. 304. *Aliter* after notice of the claim of the true owner. *Winter v. Bancks* (1901) 84 L.T. 504.

¹⁷ *Robinson v. Jenkins* (1890) 24 Q.B.D. 275; *Attenborough v. London & St. Katharine's Dock Co.* (1878) 3 C.P.D. 450.

such a case does the statute of limitations begin to run? The answer is that there is only one cause of action, namely the first act of conversion, and the statute begins to run from that time. "It is a general rule," says Willes, J., in *Wilkinson v. Verity*,¹ "that where there has once been a complete cause of action arising out of contract or tort, the statute begins to run, and that subsequent circumstances which would, but for the prior wrongful act, have constituted a cause of action are disregarded."

Thus in *Granger v. George*² the defendant received from the plaintiff certain goods by way of bailment returnable on demand, and shortly afterwards delivered them by mistake to a third person. More than six years after this misdelivery the plaintiff, being still ignorant thereof, demanded from the defendant the return of the goods. It was held that the statute of limitations ran from the date of the original conversion by misdelivery, and not from the date of the subsequent failure to deliver on demand, and that the action was barred.³

2. This rule must be read, however, in the light of the general exception of concealed fraud. If the prior act of conversion is a fraudulent one, the period of limitation runs not from the date of that conversion, but from the date of its subsequent discovery by the plaintiff. Thus in *Wilkinson v. Verity*⁴ a bailee of chattels fraudulently sold them, and the bailor, being ignorant of this conversion, demanded possession more than six years afterwards. It was held by the Court of Common Pleas that he had a good cause of action in detinue notwithstanding the lapse of time.

It is to be observed, indeed, that in this case of *Wilkinson v. Verity* the expressed ground of the decision is the fact that the cause of action was not a pure tort, but also a breach of contract; but it is difficult to reconcile any such distinction either with principle or authority. In the case of *Granger v. George*,⁵ already cited, the act of the defendant was equally a

¹ (1871) L.R. 6 C.P. p. 209.

² (1826) 5 B. & C. 149; 29 R.R. 196.

³ See also *Philpott v. Kelley* (1835) 3 A. & E. 106.

⁴ (1871) L.R. 6 C.P. 206.

⁵ (1826) 5 B. & C. 149; 29 R.R. 196.

breach of contract, and yet the decision was the opposite. The only difference between these two cases is that in *Wilkinson v. Verity* the prior conversion was fraudulent, so that the plaintiff got the benefit of the rule as to concealed fraud.⁶

If the reasoning in *Wilkinson v. Verity* is correct, it leads to the very remarkable result that whenever a bailee at will has converted, lost, or damaged the goods, the bailor, although he well knows this, may postpone his action indefinitely, and at any distance of time afterwards may make demand of the property and sue successfully in detinue. It is submitted that this is not so, and that the statute of limitations applies to a bailor in the same manner as to any other owner of goods.⁷

Successive conversions by different persons.

RULE 14.—(1) *When there have been successive conversions of the same property by different persons, each of these conversions is an independent cause of action, and the barring of one of them by the statute of limitations has no effect on the others.*

(2) *But if property is converted, and detained until the owner's right of action is barred, no person who afterwards obtains it from the wrongdoer as purchaser, bailee, or otherwise, commits any conversion against the original owner by refusing to restore it to him.*

1. The effect of the statute of limitations in respect of injuries to chattels is merely to destroy the plaintiff's right of action, but not to divest his ownership of the property. Therefore if A converts goods belonging to B, it is no defence that formerly and more than six years before action brought they were converted by X also. Thus in *Miller v. Dell*¹ a deed belonging to A was in the year 1881 fraudulently pledged by B with C, who became bankrupt, and whose assignee in 1889 delivered it to D, from whom A thereupon demanded it. It was held by the Court of Appeal that he had a good cause of action against D notwithstanding the lapse of time. For

⁶ "The statute," says Abbott, C.J., in *Granger v. George*, 5 B. & C. p. 152, "began to run from the time of the act done by the defendant, although the plaintiff had not any notice of it; there not being evidence of any fraud practised by the defendant in order to prevent the plaintiff from obtaining knowledge of that which had been done."

⁷ See *Hinchcliffe v. Sharpe* (1898) 77 L.T. 714.

¹ (1891) 1 Q.B. 468.

the mere receipt of the deed, either by C, or by his assignee in bankruptcy, or by D, was no conversion, and there was no cause of action against D until he converted the property afresh by refusing to deliver it. Even if the cause of action against B was then barred, this did not affect the new cause of action against D.²

2. What shall be said, however, if at the time when the defendant received the property from the prior wrongdoer, the plaintiff's right of action against the latter was already barred? What if A takes the goods of B, keeps them for six years, and then sells or bails them to C? Can B demand them from C, and sue in trover on a refusal to restore them? This point seems never to have been decided, but it is submitted as clear on principle that no such action will lie. The original wrongdoer has acquired a right to retain possession of the property as against the true owner, and this right should be assignable and transmissible. The owner, indeed, still retains a nominal ownership, but he has no longer the *jus possidendi*, which is now vested in the wrongdoer and in those who claim under him. To hold otherwise would lead to the absurd result that even after the statute of limitations has run in the possessor's favour, he is protected only so long as he retains the property in his own personal possession, and that it can be recovered by the true owner either by action or recaption from any agent, bailee, servant, or other person to whom the wrongdoer has intrusted it.

§ 109.—The Measure of Damages for Conversion.

RULE 15.—(a) *Any person who has a right to the immediate possession of a chattel is entitled, in an action for the conversion of it, to recover its full value as damages, even although he is not the owner of it, but has merely a limited interest in it.*

Bailee can recover the whole value of the property.

² Inasmuch as the original taking by B was fraudulent, the doctrine of concealed fraud would preserve the action even against him; but this point was not adverted to, and the decision would have been the same even had B's act been an honest one. *Spackman v. Foster* (1883) 11 Q.B.D. 99, is a similar decision on very similar facts.

(b) *When his interest is limited, the surplus damages thus recovered by him above the value of his interest are held by him on account of all other persons who have any lawful interest in the property.*

1. Thus a bailee, agent, or pledgee is entitled not merely to sue for a conversion, but to recover in such an action not only the value of his own limited interest, but the whole value of the chattel. For the plaintiff is entitled as against the defendant to the possession and specific restitution of the chattel itself, damages are merely a substitute for such restitution, and the damages must therefore be the equivalent of the chattel, and amount to the full value of it. In other words, the plaintiff in trover is entitled either to the property or to its pecuniary equivalent.

2. The same rule applies not only to conversion, but to any other injury to chattels, where the plaintiff relies on a right of immediate possession. Thus if goods in the possession of a bailee are lost or damaged by the negligence of the defendant, the bailee may recover not only his actual loss, but the whole value of the chattel, if lost, or the whole amount of its depreciation in value, if it is damaged.

The
Winkfield.

3. The leading case on the subject is *The Winkfield*,¹ in which the Postmaster-General was held entitled as bailee to recover the whole value of certain mails which were lost through a collision at sea caused by the negligence of the defendants.

Surplus
damages
held by
bailee for
owner.

4. The damages so recovered by the plaintiff above the value of his own interest are recovered and held by him on account of the other persons interested in the property, and he is liable to those others in an action for money had and received to their use. In other words, he holds the money which now represents the goods on the same trusts and terms as those on which he held the goods themselves. "As the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents

¹ (1902) P. 42. See also *Glenwood Lumber Co. v. Phillips* (1904) A.C. 405; *Armory v. Delamirie* (1721) 1 Str. 504. *Claridge v. South Staffordshire Tramways Co.* (1892) 1 Q.B. 422. is no longer law.

it. . . What he has received above his own interest, he has received to the use of his bailor."²

5. The rule that the full value of the property can be recovered even by a plaintiff with a limited interest applies only in favour of a person having a right to the immediate possession of the property. That is to say, it applies only to a plaintiff who could have sued in trover under the old practice and does not extend to a plaintiff suing in respect of some reversionary interest or right of future possession. The measure of damages in an action by such a plaintiff will be considered later.

6. Inasmuch as by the rule in *The Winkfield* a plaintiff with a limited interest recovers and holds the surplus damages on behalf of the other persons interested in the property, it follows that if the defendant himself is one of those persons, the plaintiff's claim must be reduced by the amount of the defendant's interest; otherwise we should have the absurdity of A recovering from B damages which he would have to hold on B's account. So also with any interest vested in some third person to whom the defendant is for any reason not responsible; otherwise A would recover from B on behalf of C damages to which C has no claim. Therefore if the grantor of a bill of sale wrongfully sells the chattels in fraud of the grantee, the latter cannot recover either from the grantor himself, or from the purchaser of the property, or from the auctioneer through whom the sale was effected, the whole value of the property, if it exceeds the amount of the debt, but only the value of his own interest therein, viz., the amount of the debt.³

Limits of the rule in *The Winkfield*.

² *The Winkfield* (1902) P. p. 60.

³ See *Brierly v. Kendall* (1852) 17 Q.B. 937; *Halliday v. Holgate* (1868) L.R. 3 Ex. 299; *Johnson v. Stear* (1863) 15 C.B. (N.S.) 330; *Chinery v. Viall* (1860) 5 H. & N. 288. In these last two cases nominal damages were allowed in trover for what was in reality not a cause of action in trover, the plaintiff having no right of immediate possession. The cases, however, are good authorities to the effect that in such circumstances there is no right of action even in trover for the full value of the property. See *Halliday v. Holgate* (1868) L.R. 3 Ex. 299; *Donald v. Suchling* (1866) L.R. 1 Q.B. pp. 610, 617. If the act of conversion forfeits and determines the defendant's interest in accordance with the principle already explained (*supra*, p. 310.) the present rule will be excluded and full damages can be recovered. *Mulliner v. Florence* (1878) 3 Q.B.D. 484.

7. It has never been decided, but it is presumably the law that a plaintiff entitled under the rule in *The Winkfield* to recover the whole value of the property on account of himself and all other persons interested can do so only if these others stand by and make no objection. A bailee, for example, can not against the will of his bailor, or an agent against the will of his principal, recover the full value of the property on his behalf. Therefore if the bailor or principal has already received, with or without an action, the value of his interest from the defendant, it is impossible for the bailee to recover more than his own interest. It seems also to follow that, even though no such prior satisfaction has been made, it is a good defence to a claim for full value made by a plaintiff with a limited interest, that a claim has been already made on the defendant by another person interested in the property, and that the action is defended on that person's behalf and by his authority. It is settled that this is a good plea in an action brought by a plaintiff with a merely possessory interest,⁴ and there seems no reason why it should be less effective in a claim by a plaintiff with a limited interest for damages in excess of that interest.

Effect of
satisfaction
made to the
bailee.

8. When a defendant has, in accordance with the rule in *The Winkfield*, paid the full value of the property to a claimant with a limited interest, he is probably thereby discharged from all liability to any other person interested in the property. "The wrongdoer," says Collins, M.R., in *The Winkfield*,⁵ "having once paid full damages to the bailee, has an answer to any action by the bailor." So Parke, B., in *Nicolls v. Bastard*,⁶ speaking of bailor and bailee says: "Whichever first obtains damages, it is a full satisfaction." This matter, however, has been very little considered and involves serious difficulties. The rule is clearly otherwise in the case of payment to a wrongdoer having a merely possessory title; payment to him, even by compulsion of the law, is no defence against a subsequent claim by the true owner.⁷ What, then, shall be said of payment to a finder, or to a bailee who has

⁴ *Biddle v. Bond* (1865) 6 B. & S. 225.

⁵ (1902) P. p. 61.

⁶ (1835) 2 C.M. & R. p. 660; 41 R.R. p. 816.

⁷ *Attenborough v. London & St. Katharine's Dock Co.* (1878) 3 C.P.D. p. 454, *per* Bramwell, B.

already refused to deliver to his bailor? Moreover, since he who *buys* property from a mere bailee, and pays him for it, has no defence against the bailor in an action for the value, why should he be in a better position if he *converts* the property and then pays for it? When a bailee recovers the full value of the chattel, he holds it on account of the bailor; why should the risk of the loss of this money by the bailee's misappropriation or bankruptcy lie upon the innocent bailor, rather than upon the wrongdoer who converted the property?

RULE 16.—*Any plaintiff who has a possessory title to property is entitled to recover the same damages for a conversion of it as if his possessory title amounted to legal ownership.*

When a plaintiff has and relies on a possessory title, the *jus tertii* is no more available as a ground for the reduction of damages, than as a defence to the action. As against a wrongdoer a possessory title is to be taken as being a legal one, and it has the same effects. Therefore a finder or wrongful possessor of goods may recover the full value from any one who converts them, unless he defends the action on behalf and by the authority of the true owner, or has already made satisfaction to him.¹

Damages recoverable by possessory owner.

RULE 17.—*The value recoverable in an action for conversion is the value of the property at the date of the conversion, and not its value at any earlier or later date.*

1. When there has been an alteration in the value of the converted property, it may become a question, which of these amounts is to be taken as the measure of damages. The general answer to this question is contained in the present rule. If the property falls in value after the date of the conversion, even without any act or default of the defendant, he is nevertheless liable to account for its original value; as if a horse is wrongfully taken or detained, and dies in the defendant's possession. For *non constat* that the plaintiff would not, before such a loss occurred, have sold the property and so obtained the full value for it.

Value recovered as at date of conversion.

¹ *Armory v. Delamirie* (1721) 1 Str. 505; *Bridges v. Hawkesworth* (1851) 21 L.J. Q. B. 75; *The Winkfield* (1902) P. 42.

2. If, on the other hand, the property increases in value after the date of the conversion, a distinction has to be drawn. If the increase is due to the act of the defendant, the plaintiff has no title to it, and his claim is limited to the original value of the chattel. Thus in *Reid v. Fairbanks*¹ the defendant wrongfully took possession of a half-finished ship belonging to the plaintiff, and then completed the building of it; and it was held that the plaintiff could recover only the value of the unfinished article. So if coal is wrongfully extracted from the plaintiff's land, he recovers at the most the value of the coal at the moment when it first became a chattel by severance from the seam, and not its value when it has been raised from the mine, or transported to some place where its price is higher.²

3. If, however, the subsequent increase of value is not due to the act of the defendant, but would have occurred in any case, even had no conversion been committed, the plaintiff is entitled to recover it, in accordance with Rule 18, as special damage resulting from the conversion, in addition to the original value of the property converted: as when goods taken or detained have risen in value by reason of the fluctuation of the market.^{3 4}

Special damages in addition to value of the property.

RULE 18.—*In all actions for a conversion the plaintiff may recover, in addition to the value of the property or of his interest in it, any additional damage which he may have sustained by reason of the conversion, and which is not too remote.*⁵

RULE 19.—*The foregoing rules as to the measure of damages for a conversion apply mutatis mutandis to actions for any wrongful loss, destruction, or damage of chattels, not amounting to conversion.*⁶

¹ (1853) 13 C.B. 692.

² *Taylor v. Mostyn* (1886) 33 Ch.D. 226; *Morgan v. Powell* (1842) 3 Q.B. 278, 61 R.R. 228.

³ *Greening v. Wilkinson* (1825) 1 C.P. 625; 28 R.R. 790.

⁴ As to the measure of damages for a conversion, when the chattels converted have been severed from land, as in the case of minerals, crops, or fixtures, see above p. 171.

⁵ *Bodley v. Reynolds*, (1846) 8 Q.B. 779, 70 RR. 640; *France v. Gaudet* (1871) L.R. 6 Q.B. 199; *Thurston v. Charles* (1905) 21 T.L.R. 659.

⁶ *The Winkfield* (1902) P. 42.

§ 110.—Specific Restitution of Chattels.

RULE 20.—*In all actions for conversion, when the property converted remains in the possession or control of the defendant, and the plaintiff is entitled to the immediate possession of it, the Court has discretionary power on the application of the plaintiff to order the restoration of the property itself, instead of payment of its pecuniary value, and such an order is enforceable by writ of possession or by attachment.* Discretionary power to order specific restitution.

1. Under the old practice *detinue* was an action for the specific recovery of the property itself, together with damages for its detention. The claim made for the value of the property in such an action was merely alternative and subsidiary, in case specific restoration proved to be impossible. The judgment in *detinue*, therefore, was for the return of the property, or payment of its value if such a return could not be obtained; and this judgment was enforced by the seizure of the property, or by the distress of the defendant by all his lands and goods until he made delivery.¹

The actions of trespass *de bonis asportatis* and of *trover*, on the other hand, were brought not for the recovery of the property, but for damages equal to the value of it, and there was no procedure by which specific restitution could be ordered or enforced. After *detinue* had fallen out of use, therefore, there was no effective method at common law by which an owner of goods could recover the possession of them, and it was necessary to have recourse to the discretionary power of the Court of Chancery to issue injunctions.² By the Common Law Procedure Act, 1854, sec. 78, it was provided that in all actions for the wrongful detention of chattels the courts of common law should have power to order specific restitution. The jurisdiction thus created is preserved and made more effective by the Judicature Acts and the Rules of the Supreme Court.³

¹ *Donald v. Suchling* (1866) L.R. 1 Q.B. p. 601: Chitty's Pleading, 1. p. 139, 7th ed.

² *Pusey v. Pusey* (1684) 1 Vern. 273; *Falcke v. Gray* (1859) 4 Drew. 651.

³ See Order XLII. r. 6; Order XLVIII. r. 1; *Hyman v. Ogden* (1905) 1 K.B. 246.

When restitution will not be granted.

2. The power of the court to order specific restitution of chattels is discretionary and not a matter of right on the part of the plaintiff. Such an order, therefore, may be either refused altogether, or made only on such terms as to the court seem necessary to do complete justice between the parties.⁴ This being so, it may be assumed that one or other of these courses will be adopted in all cases in which the value of the chattel exceeds the amount of damages to which the plaintiff is entitled. If the defendant has, since taking the property, increased the value of it by his own labour or expenditure, the plaintiff, as we have already seen, is entitled to recover as damages only its original, and not its present value.⁵ This being so, it is clear that if the plaintiff seeks specific restitution instead of damages, the court must either refuse this remedy altogether, or grant it only on the terms that the plaintiff shall make to the defendant a fair allowance in respect of the increased value of the property.⁶

Accessio, specificatio, and confusio in English law.

3. It is in this circumstance that specific restitution is a matter of judicial discretion and not of right, that we must find the solution in English law of all those puzzles concerning *accessio*, *specificatio*, and *confusio*, which we find discussed with such unsatisfactory results in Roman law and the Continental systems founded upon it, and concerning which there is so little authority in our own system. *Accessio* is the combination of two chattels belonging to different persons into a single article, as when A's cloth is used to patch B's coat. *Specificatio* is the making of a new article out of the chattel of one person by the labour of another: as when A's corn is ground into flour by B, or his grapes are made into wine. *Confusio* or *commixtio* is the mixture of things of the same nature but belonging to different owners, so that the identification of the things is no longer possible: as when A's money or wheat becomes mixed with that of B. In all these cases there are two questions to be asked which must be kept distinct. The first, which is of quite subordinate importance,

⁴ *Chilton v. Carrington* (1855) 15 C.B. p. 740, *per* Maule, J.; *Peruvian Guano Co. v. Dreyfus Bros.* (1892) A.C. p. 176, *per* Lord Macnaghten.

⁵ *Supra*, p. 322.

⁶ *Peruvian Guano Co. v. Dreyfus Bros.* (1892) A.C. p. 176, *per* Lord Macnaghten.

is : In whom is the ownership of the new article so created ? The second, which is independent of the first, is : Who is entitled to the possession of the new article, and on what terms will he be permitted to retain or recover it ? As to the first of these questions, our law seems to be destitute of any adequate authority. Such authority as we have is mostly of ancient date and shows a tendency to follow the conclusions of Roman law on this matter. It is submitted, however, that these authorities are of no weight at the present day, having regard to the modern developments of the law of conversion, and that the true principle of English law is that a man's property in chattels is not divested by any such events. If my corn is wrongfully taken from me and made into flour, the flour is mine ; and if my tree is cut down and sawn into timber, the timber is mine.⁷ If my sheep become mixed with another's, so that their identification is impossible, he and I are owners in common of the whole flock in the proportions of our respective contributions to it.⁸

Over and above the question of ownership, however, there arises the question of the right of possession. Here English law avoids all difficulties by making the matter one of judicial discretion unfettered by any general principles. The court is left free in any such case to make an order for specific delivery of the property to the claimant who, having regard to all the circumstances, has the best right to it, and to impose on him such terms as are deemed just for compensating the other party for his interest in the property. It may be assumed that in all ordinary cases the court will be guided by the relative values of the interests of the rival claimants. Possession will be awarded to him whose interest is the most substantial, on the terms that he pays the value of the other's interest. If A takes the horse of B, and puts new shoes on it, B will obtain specific restitution of the horse, but, it may be, only on paying for the shoes. But if A takes the marble of B, and makes a statue of it, B will ask in vain for specific restitution,

⁷ Y.B. 5 H. 7, f. 15. pl. 6.

⁸ *Buckley v. Gross* (1863) 3 B. & S. 566 ; *Lupton v. White* (1808) 15 Ves. 432, 10 R.R. 94.

and will be left to his claim for damages amounting to the original value of the marble.⁹

Discretionary power to order plaintiff to accept restitution instead of damages.

RULE 21.—*In all actions for a conversion, when the property remains in the possession or control of the defendant, and he is ready and willing to restore it, the court has discretionary power on the application of the defendant to order that its restoration be accepted by the plaintiff in lieu of the payment of its value.*

1. When property has once been converted, there is a vested right of action in trover, which is not divested by the fact that the owner subsequently accepts restitution of the property. Such a recovery of possession goes merely in mitigation of damages, and not in bar of the action. Therefore the plaintiff may still commence or proceed with his action for the recovery of such damages as are due in respect of his temporary dispossession.¹

2. But is the plaintiff bound to accept such a restitution of converted property, or can he refuse a tender of it and insist on his right to sue for its value in trover? Under the old practice a tender of the goods was a good plea in an action of detinue, for this action was brought not for damages, but for the recovery of the goods themselves.² In trespass and trover, on the contrary, the plaintiff had a good cause of action for the value of the goods, and was not bound to accept the goods themselves; and the only remedy of a defendant who was able and willing to restore the property was to apply to the court to exercise its discretionary power of staying the action on delivery of the goods. After some hesitation and reluct-

⁹ The following authorities on *accessio*, *specificatio*, and *confusio* in English law may be referred to: Y.B. Henry 7. f. 15. pl. 6; Cro. Jac. 366; Popham 38; Moore 19; 1 Hale's P.C. 513; Blackstone II. 404; *Buckley v. Gross* (1863) 3 B. & S. 566; *Lupton v. White* (1808) 15 Ves. 432, 10 R.R. 94. The modern Continental codes have largely abandoned the conclusions of Roman law, but the rules established in substitution are so vague and unsatisfactory as to lead irresistibly to the conclusion that English law is wise in treating the matter as one for the exercise of judicial discretion and not for the application of fixed principles. See the French Civil Code ss. 565—577; German Civil Code, ss. 946—952.

¹ *Moon v. Raphael* (1835) 2 Bing. N.C. 310.

² *Crossfield v. Such* (1852) 8 Ex. 159.

ance the courts finally consented to exercise this power in cases in which it was just to the plaintiff that he should be thus compelled to accept the property, and in which complete justice could be so done to the parties.³

3. How, then, does the matter stand under the modern practice? Presumably in this way: that if the plaintiff sues for specific restitution, he is bound to accept a tender of the property, on the analogy of the action of detinue; but if he chooses to sue merely for the value of the property (as in the old actions of trover and trespass) it is in the discretion of the court whether and on what terms the action will be allowed to proceed, if the defendant offers to restore the property.

§ 111.—Replevin.

RULE 22.—*Whenever chattels are taken by one person out of the possession of another, whether by way of distress or otherwise, the latter may by way of proceedings in replevin recover immediate and provisional possession of them, pending the result of an action brought by him to determine the rights of the parties.*

Nature of the
remedy of
replevin.

1. The right to replevy goods is a right to get them back at once and provisionally, instead of having first to establish one's title to them in an action of trover, detinue, or trespass. Application is made by the claimant (called the replevisor) to the Registrar of the County Court within the jurisdiction of which the goods were taken, and he issues a warrant for their restitution on security being given by the replevisor, by way of bond or deposit of money, that he will commence and prosecute, either in the County Court or in the High Court, an action of replevin, in which the title to the goods and the rights of the parties shall be determined.¹

³ *Tucker v. Wright* (1826) 3 Bing. 601: "When complete justice can be done by the delivery of a specific chattel, the court will sometimes interfere to stay proceedings." *Moon v. Raphael* (1835) 2 Bing. N.C. 310; *Fisher v. Prince*, 3 Burr. 1363; *Cooke v. Holgate*, Barnes 281; *Pichering v. Truste* (1796) 7 T.R. 53.

¹ As to the procedure in replevin, see the County Courts Act, 1888, (51 & 52 Vict. c. 43 ss. 133-137) and County Court Rules, 1903.

When
available.

2. Replevin is allowable only when the chattels have been *taken* by the defendant out of the plaintiff's possession. It is not available for a mere detention or for any other dispute as to the title or right of possession. The process is based on the presumption that the possessor of goods is the owner of them, and that a seizure of them is illegal, conferring therefore upon the possessor a right to their provisional restoration pending an inquiry into the title.²

3. The right of replevin is usually exercised only in cases of distress, whether for rent, damage feasant, or otherwise. But it is legally available for all forms of taking, whether under colour of distress or not.³

Effect of this
remedy.

4. If the plaintiff succeeds in an action of replevin, he keeps the property which has been thus provisionally restored to him, and has judgment for all damages and costs resulting from the defendant's seizure of it.⁴ If the defendant succeeds, he has judgment for the restitution of the property, or in the alternative (when his claim is one of distress) for the payment of the amount claimed by him.⁵

§ 112.—Effect of Judgment in an Action of Trover.

RULE 23.—*Payment of the full value of any chattel converted, made by the defendant to the plaintiff (whether before or after action brought or judgment recovered) divests the title of the plaintiff and of all other persons (if any) whose right of action is barred by such a payment, and vests that title in the defendant or in some person claiming through him.*

Judgment
in trover
without
satisfaction
does not
affect title to
the property.

1. A mere judgment in trover for the value of the property without actual satisfaction, does not in any way affect the plaintiff's title to the property. It does not amount to an election to take the pecuniary value of the goods in lieu of the

² *Mennie v. Blake* (1856) 6 E. & B. 842; *Shannon v. Shannon* (1804) 1 Sch. & Lef. 324, 9 R.R. 36.

³ *Shannon v. Shannon* (1804) 1 Sch. & Lef. 324, 9 R.R. 36; County Court Rules, O. 34, r. 6.

⁴ *Gibbs v. Cruikshank* (1873) L.R. 8 C.P. 454; *Smith v. Enright* (1893) 69 L.T. 724.

⁵ County Court Rules, O. 34, r. 4, 5, 6.

goods themselves. Therefore he may exercise all his rights as owner notwithstanding the judgment. He may seize the chattel either from the defendant or from any one else in whose hands it is. He may sue a third person for its specific restitution. He may even sue for damages, and get a second judgment for the value of the property against a third person in respect of any other conversion committed either before or after the conversion on which the first action was brought. Yet in no case can he by the exercise of such concurrent remedies obtain a double satisfaction. If he actually recovers the property, his judgment for its value becomes inoperative; and if he actually receives its value, he cannot exercise his right of recaption or enforce his judgment for specific restitution. And if he receives its value from one defendant, he cannot enforce his judgment against another.^{1 2}

2. Although judgment without satisfaction has thus no effect upon the property or upon the rights of the owner of it, judgment for the value of the goods followed by full satisfaction divests the plaintiff's ownership and vests it in the defendant. It amounts to an election on the part of the plaintiff to accept money in lieu of the goods. It is in effect a compulsory purchase of the goods by the defendant. The same result must follow from payment of the full value even without action or judgment, if made to a person entitled to receive it. After such satisfaction, therefore, the former *Aliter if followed by satisfaction.*

¹ See on the whole matter *Brinsmead v. Harrison* (1871) L.R. 6 C.P. 584; *ex pte Drake* (1877) 5 Ch.D. 866; *Morris v. Robinson* (1824) 3 B. & C. 196, 27 R.R. 322.

² It is to be remembered, however, that if two defendants have not merely converted the same property, but have in so doing made themselves joint-wrongdoers, a judgment against one of them even without satisfaction is a bar to a subsequent action against the other. *Brinsmead v. Harrison* (1872) L.R. 7 C.P. 547.

It seems, however, that if A has committed two successive acts of conversion against the same property, the first of which was committed jointly with B, and the second separately by himself, judgment against B for the first conversion will be no bar to a further action against A for the second. Thus where A and B took the plaintiff's property and subsequently B alone detained it and refused to deliver it, it was held that an action for that detention would lie against B notwithstanding a previous judgment against A for the taking. *Brinsmead v. Harrison* (1871) L.R. 6 C.P. 584.

owner is deprived of all his rights of recaption and specific restitution. Nor can he sue for damages in respect of any conversion subsequent to satisfaction made. As to any prior conversion, on the other hand, he presumably retains a right to sue for any actual damage sustained by him in consequence of it, over and above the value of the goods.³

3. Property so divested from the plaintiff by satisfaction made does not necessarily vest in the defendant. It may vest instead in some person who claims under him, and therefore has a better title to the property than he has. For example, when A takes property from B, and sells it to C, satisfaction made by A to B, will vest the property in C.

4. Satisfaction made to a plaintiff in trover does not operate to transfer the ownership of the property save as against the plaintiff himself, and as against any other persons whose right of action for damages is barred by the action of the plaintiff. Thus payment made to a mere possessory owner will not divest the title of the true owner; and whether payment made to a bailee will divest the title of his bailor depends on whether an action brought by a bailee is a bar to a subsequent action by the bailor.⁴

OTHER INJURIES TO CHATTELS.

§ 113.—Trespass to Chattels.

Trespass to
chattels
defined.

1. The wrong of trespass to chattels consists in committing without lawful justification any act of direct physical interference with a chattel in the possession of another person. That is to say, it is such an act done with respect to a chattel, as amounts to a direct forcible injury within the meaning of the distinction drawn in the old practice between the writ of trespass and that of trespass on the case.¹ Thus it is a trespass to take away a chattel, or to do wilful damage to it. Even negligent damage, if direct and not merely consequential, falls within the scope of trespass: as in the case of a negligent collision between two vehicles.²

³ *Brinsmead v. Harrison* (1871) L.R. 6 C.P. 584.

⁴ As to this see p. 320 above.

¹ *Supra*, p. 155.

² *Leame v. Bray* (1803) 3 East 593.

2. Physical interference usually consists in some form of physical contact—some application of force by which the chattel is moved from its place or otherwise affected. But this is not essential. It is presumably a trespass wilfully to frighten a horse so that it runs away, or to drive cattle out of a field in which they lawfully are, or to kill a dog by offering it poisoned meat.

3. The wrong of trespass is partially coincident with that of conversion. A wilful trespass causing a loss of the possession of the chattel is also a conversion. But there may be trespass without conversion, and conversion without trespass. That form of trespass which consists in an actual taking away of chattels is termed trespass *de bonis asportatis*, and is wholly included within the scope of conversion.³ There is, indeed, no reason at the present day why, for the purpose of the law of torts, a trespass to chattels should not be defined in such a way as to exclude all acts which amount to conversion—thus avoiding any such overlapping of different injuries.

4. It is probable that a trespass to chattels is actionable *per se* without any proof of actual damage. This, indeed, seems never to have been decided, but it is clearly so in the case of trespass to land and to the person, and there is no reason why it should be otherwise in the case of goods. If this is so, any unauthorised touching or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues. It may be very necessary for the protection of certain kinds of property that this should be the law.⁴

5. Trespass to chattels, like trespass to land, is essentially an injury to the right of possession and not to that of ownership. A trespass, therefore, is, in itself and as such, actionable only at the suit of a person who is in possession of the property at the time of the act committed.⁵

6. Nevertheless if a trespass does any permanent damage to the property, a reversionary owner or other person having a non-possessory interest in it, has a right of action for the loss so caused to him; and we need not scruple at the present day

³ *Supra*, p. 296.

⁴ See Pollock, *Law of Torts*, p. 342, 7th ed.

⁵ *Ward v. Macauley* (1791) 4 T.R. 489.

to term such an injury to reversionary rights a trespass, although the remedy under the old practice was not trespass but case.⁶

7. The rules already set forth under the head of conversion, with respect to the title to property, and with respect to the measure of damages, apply to the wrong of trespass also.

§ 114.—Wrongful Damage to Chattels.

Wrongful
damage
distinguished
from trespass

1. The injury of wrongful damage to chattels consists in an act done without lawful justification by which physical harm is done to chattels. Such harm may be caused either intentionally or negligently, and is actionable even in the absence of intention or negligence in those exceptional cases in which absolute liability is imposed by law : as, for example, in the case of harm done by animals.

2. The injury of wrongful damage is largely coincident with that of trespass, but the coincidence is far from complete, and these two wrongs require to be classed separately. For there may be trespass without physical harm, as we have seen ; and there may be wrongful damage without trespass, as when a bailee does wilful or negligent harm to the property bailed to him, or when negligent or accidental harm is done consequentially and not directly, as in the case of damage by animals or fire. It is true, indeed, that the distinction between direct and consequential damage is now of no practical importance, but it remains still, as much as ever, the only means of defining the injury of trespass.

§ 115.—Wrongful Loss of Chattels.

Wrongful
loss of
chattels not
amounting
to conver-
sion.

We have already seen that although the act of wrongfully causing a loss of the possession of chattels amounts in most cases to the wrong of conversion, this is not invariably so. It depends on whether the loss is the result of any wilful and wrongful interference with the chattels. A loss not so resulting is no conversion,¹ and must therefore be separately classed as a distinct form of injury. Thus if a carrier or warehouseman

⁶ *Mears v. London & S.W. Rly. Co.* (1862) 11 C.B. (N.S.) 850.

¹ *Supra*, p. 294.

delivers goods by mistake to the wrong person, he is liable in certain circumstances for a conversion, but not if he loses them by negligence. He could not in this latter case have been sued under the old practice in trover, but only in detinue, case, or assumpsit. So he who negligently leaves open the gate of a field, whereby cattle escape and are lost, is guilty of no conversion, but only of having caused by negligence a wrongful loss of chattels.

CHAPTER XI.

INJURIES TO THE PERSON.

Injuries to the person are of four kinds : namely, Death, Assault, Bodily Harm, and False Imprisonment.

§ 116.—Death.

Death not a civil wrong at common law.

1. At common law it is not a civil wrong to cause the death of a human being. The wrong done to the deceased himself by the taking away of his life dies with him, in accordance with the maxim *Actio personalis moritur cum persona* ; and neither the mental suffering nor the material loss inflicted upon his family or upon other persons having an interest in his life is regarded by the common law as any ground of action.¹ Although a husband can sue at common law for any wilful or negligent harm done to his wife, whereby he is temporarily deprived of her society or services, he cannot sue in respect of that permanent deprivation which he suffers by reason of her death.² A father's rights in respect of his children are similarly limited. Thus in *Osborn v. Gillett*³ a father sued at common law for the death of his daughter, who had been negligently run over and killed by the defendant. The defendant pleaded that the deceased had been killed on the spot, and therefore that the plaintiff had not been deprived of the services of his daughter otherwise than by her death ; and it was held by the Court of Exchequer that the plea was good. Had the death ensued after an interval only, the plaintiff would have had a good cause of action for loss

¹ *Baker v. Bolton* (1808) 1 Camp. 493, 10 R.R. 734 ; *Osborn v. Gillett* (1873) L.R. 8 Ex. 88 ; *Clark v. London General Omnibus Co.* (1906) 2 K.B. 648.

² *Baker v. Bolton* (1808) 1 Camp. 493 ; 10 R.R. 734.

³ (1873) L.R. 8 Ex. 88.

of service during that interval, but none in respect of the death. So in *Clark v. London General Omnibus Co.*⁴ it was decided by the Court of Appeal that a father cannot recover even the funeral expenses incurred by him in respect of the death of his child killed by the negligence of the defendant.

This rule that no man has any legally protected interest in the life of another has been to a great extent derogated from by statute, but it still remains the general principle, the statute in question having merely established special exceptions to it.

2. By the Fatal Accidents Act, 1846,⁵ otherwise known as *Aliter* by Lord Campbell's Act, it is a civil wrong, actionable by or on behalf of the near relatives of the deceased, to cause the death of a human being, if the deceased himself would have had a right of action had he been merely injured and not killed, and if those relatives have suffered a pecuniary loss in consequence of his death. Statute.
The Fatal
Accidents
Act.

3. The relatives whose interests are thus protected are the following : husband, wife, children, grandchildren, step-children, father, mother, step-parents, and grandparents.⁶ Illegitimate children are not included,⁷ but posthumous children are.⁸

4. The action must be brought within twelve months after the death by the executor or administrator of the deceased on behalf of the relatives ; but if there is no executor or administrator, or if he does not commence an action within six months, any relative entitled to the protection of the Act may sue in his own name on behalf of himself and the others.⁹

5. The amount recovered is divisible among the relatives in the proportions fixed by the jury, having regard to the loss suffered by each of them.¹⁰ If the claim is settled without action, the shares of the relatives may be determined by the court in proceedings instituted for that purpose.¹¹

⁴ (1906) 2 K.B. 648.

⁵ 9 & 10 Vict. c. 93.

⁶ s. 5. ⁷ *Dickinson v. N.E. Rly. Co.* (1863) 2 H. & C. 735.

⁸ *The George and Richard* (1871) L.R. 3 A. & E. 466.

⁹ 9 & 10 Vict. c. 93 s. 3, as amended by 27 & 28 Vict. c. 95, s. 1. The relatives may sue even within the six months if there is no executor or administrator. *Holleran v. Bagnell* (1879) 4 L.R. Ir. 740.

¹⁰ 9 & 10 Vict. c. 93 s. 2. See 27 & 28 Vict. c. 95, s. 2.

¹¹ *Bulmer v. Bulmer* (1884) 25 Ch.D. 409.

6. The amount recovered is not part of the estate of the deceased, so as to be liable for his debts. The executor or administrator recovers it, not in his ordinary capacity as the personal representative of the deceased, but in a special capacity in right of the relatives.

7. There is no right of action unless the deceased himself could have sued, had he been merely injured by the defendant's act and not killed. Therefore if he has in his lifetime, in the interval between the accident and his death, accepted full compensation from the defendant, and so extinguished his right of action, his relatives cannot sue in respect of his death.¹² The same result follows if he has been guilty of contributory negligence,¹³ or if he agreed to take the risk of the accident on himself, so as to exclude any right of action in accordance with the maxim *Volenti fit non injuria*,¹⁴ or if the statute of limitations has run against him.¹⁵

No compensation without pecuniary loss.

8. There is no right of action on behalf of any relative who cannot show some pecuniary loss in consequence of the deceased's death.¹⁶ Nothing can be claimed merely by way of *solatium* for the mental suffering and bereavement, nor is there any action for nominal damages in the absence of proof of actual loss.¹⁷ There is, however, a sufficient pecuniary loss if the claimant can show some reasonable expectation of pecuniary benefit from the continuance of the deceased's life; and it is not necessary that the benefit should be derived from the deceased as a matter of right, for a reasonable expectation of voluntary bounty is enough.¹⁸ The benefit must be derived, however, from the claimant's relationship to the deceased, and not merely from a contract between them.¹⁹ Funeral expenses have been held not to be a pecuniary loss resulting

¹² *Read v. Gl. Eastern Rly. Co.* (1868) L.R. 3 Q.B. 555. But see p. 118. above.

¹³ *Senior v. Ward* (1859) 28 L.J. Q.B. 139; *Wright v. Midland Rly. Co.* (1884) 51 L.T. 539.

¹⁴ *Griffiths v. Earl of Dudley* (1882) 9 Q.B.D. 357.

¹⁵ *Williams v. Mersey Docks & Harbour Board* (1905) 1 K.B. 804.

¹⁶ *Blake v. Midland Rly. Co.* (1852) 18 Q.B. 93.

¹⁷ *Duckworth v. Johnson* (1860) 29 L.J. Ex. 25.

¹⁸ *Franklin v. S.E. Rly. Co.* (1858) 3 H. & N. 211.

¹⁹ *Sykes v. N.E. Rly. Co.* (1875) 44 L.J. C.P. 191.

from the death within the meaning of this rule, though it is difficult to see why they are not.^{20 21}

9. The fact that the killing of the deceased amounted to the felony of murder or manslaughter does not exclude or even suspend the remedy by action.²²

10. Where the deceased himself has a cause of action which survives him notwithstanding the maxim *Actio personalis moritur cum persona*, his personal representative has a double right of action; he can sue both on behalf of the deceased's estate and also on behalf of the relatives. Thus if a passenger on a railway is injured by the negligence of the company, and dies after an interval, his executor can sue as such for the medical expenses and other loss incurred by the personal estate by reason of the defendant's breach of contract, and he can also sue in another action for the compensation due to the relatives under the Fatal Accidents Act.^{23 24}

Concurrent
rights of
action.

§ 117.—Assault.

1. The intentional application of force to the person of another without lawful justification amounts to the wrong of assault. This is so however trivial the amount or nature of the force may be, and even though it neither does nor is intended nor is likely or able to do any manner of harm. Even to touch a person without his consent or some other lawful reason is

Assault and
battery.

²⁰ *Dalton v. S.E. Rly. Co.* (1858) 27 L.J. C.P. 227; *Clark v. London General Omnibus Co.* (1906) 2 K.B. 648.

²¹ As to the nature of the loss which is required to give a good cause of action, see the following cases in addition to those already cited. *Stimpson v. Wood* (1888) 57 L.J. Q.B. 484; *Hetherington v. N.E. Rly. Co.* (1882) 9 Q.B.D. 160; *Pym v. Gt. N. Rly. Co.* (1893) 4 B. & S. 396; *Harrison v. L. & N.W. Rly. Co.* 1 Cab. & E. 540. As to the effect of the receipt of life assurance money by the relatives see *Grand Trunk Rly. of Canada v. Jennings* (1888) 13 A.C. 800; *Hicks v. Newport Rly. Co.* (1857) 4 B. & S. 403 n.

²² 9 & 10 Vict. c. 93, s. 1.

²³ *Leggott v. Gt. N. Rly. Co.* (1876) 1 Q.B.D. 599.

²⁴ An action will lie under this Act on behalf of the alien relatives of an alien killed upon the high seas, for the benefits of the Act are not limited to British subjects and resident aliens. *Davidsson v. Hill* (1901) 2 K.B. 606. The decision of Darling, J., to the opposite effect in *Adam v. British & Foreign Steamship Co.* (1898) 2 Q.B. 430, must be regarded as unsound.

actionable.¹ For the interest that is protected by the law of assault is not merely that of freedom from bodily harm, but also that of freedom from such forms of insult as may be due to interference with his person. In respect of his personal dignity, therefore, a man may recover substantial damages for an assault which has done him no physical harm whatever.²

2. Intentionally to bring any material object into contact with another's person is a sufficient application of force to constitute an assault : for example, to throw water upon him, or to pull a chair from under him whereby he falls to the ground.³ So it is an assault forcibly to take from him some chattel which he holds.⁴

Also a
criminal
offence.

3. An assault is not merely a tort, but also a criminal offence, and the civil and criminal remedies are in general concurrent and cumulative. It is provided, however, by 24 & 25 Vict. c. 100, s. 45, that *summary* criminal proceedings, whether they result in a conviction or an acquittal (after an actual hearing on the merits) are a bar to any subsequent civil proceedings for the same cause.

Assault with-
out battery.

4. The act of putting another person in reasonable fear of an immediate assault (as already defined) by means of an act amounting to an attempt or threat to commit an assault amounts itself to an actionable assault. In the older language of the law the term assault was limited to this species, while the actual application of force was distinguished as battery. In popular speech, however, the term assault includes both ; and there is no reason why legal terminology should not acknowledge the same use of it. Mere words do not constitute an assault, however insulting or even menacing ; the intent to do violence must be expressed in threatening acts, not merely in threatening speech. Even threatening acts do not constitute an assault, unless they are of such a nature as to put the plaintiff in fear of immediate violence. To shake one's fist in a man's face is an assault ; to shake it at a man

¹ *Cole v. Turner* (1704) 6 Mod. 149, *per* Holt, C.J. ² See above p. 102.

³ *Pursell v Horn* (1832) 8 A. & E. 602; *Hopper v. Reeves* (1817) 7 Taunt. 698, 18 R.R. 629.

⁴ *Green v. Goddard* (1704) 2 Salk. 640.

who by his distance from the scene of action is inaccessible to such violence is none.

There need be no actual intention or power to use violence, for it is enough if the plaintiff on reasonable grounds believes that he is in danger of it. Thus it is actionable to point a gun at a man in a threatening manner, even though to the knowledge of the defendant, but not to that of the plaintiff, it is unloaded. But if there is no fear or no reasonable fear, there is no assault ; as for example, when a gun is pointed at a man behind his back.⁵

§ 118.—Bodily Harm.

1. It is an actionable wrong to cause bodily harm to another person either (1) intentionally and without lawful justification, or (2) negligently and in breach of a duty to use care for the safety of that person, or (3) accidentally in those exceptional cases in which the law imposes absolute liability. This species of wrong is partially coincident with that of assault ; but there are assaults which cause no bodily harm, and it is possible in two ways to inflict unlawful bodily harm without committing an assault : *viz.*, (1) when it is inflicted negligently and not wilfully, and (2) when, although wilful, it is inflicted otherwise than by the application of physical force : for example, by administering a deleterious drug.

2. The term physical harm includes illness due to mere nervous shock : as when the plaintiff suffers in health through the terror of a narrow escape from sudden death, or through agitation caused by a false alarm wilfully given by the defendant.¹

⁵ See on the whole matter, *Tuberville v. Savage* (1669) 1 Mod. 3 ; *Stephens v. Myers* (1830) 4 C. & P. 349, 34 R.R. 811 ; *Read v. Coker* (1853) 13 C.B. 850 ; *Cobbett v. Grey* (1849) 4 Ex. p. 744 ; *Osborn v. Veitch* (1858) 1 F. & F. 317.

¹ *Wilkinson v. Downton* (1897) 2 Q.B. 57 ; *Dulieu v. White* (1901) 2 K.B. 669 ; *Bell v. Gt. N. Rly. Co.* (1890) 26 L.R. Ir. 428. The contrary decision of the Privy Council in *Victorian Railways Commissioners v. Coultas* (1888) 13 A.C. 222, has been repeatedly disapproved and may be taken to be unsound. It remains open to the defendant, however, in any case of this class to contend that in the particular circumstances of the case the damage thus caused by nervous shock is too remote ; as for example in *Smith v. Johnson* cited in *Dulieu v. White* (1901) 2 K.B. at p. 675.

3. It need not be doubted that the term physical *harm* also includes physical *pain*, even though unaccompanied by any bodily lesion or illness. In respect of merely mental suffering on the other hand, such as fear, it seems that no action will lie even though it has been wilfully caused by the defendant. "Mental pain or anxiety the law cannot value and does not pretend to redress."²

Bodily harm
to unborn
child.

4. It was held by an Irish Court in *Walker v. Great Northern Railway Company of Ireland*³ that no action can be brought by a child for physical injuries inflicted on it before birth, by reason whereof it is born deformed or diseased. In this case the plaintiff's mother had, while the plaintiff was *en ventre sa mere*, been a passenger on the railway of the defendants, and was there injured in a collision caused by the defendants' negligence, and the plaintiff was subsequently and consequently born deformed. The decision of two of the four judges, however, proceeded on the ground that the defendants owed no duty of care to a person of whose existence and presence they were unaware, and not on the more general ground that an unborn person has no legal right of personal security. It is difficult to see on what principle an existing but unborn child should be deprived of the protection of the law against wilful or negligent injuries inflicted upon it.

§ 119.—False Imprisonment.

False imprisonment
defined.

1. The wrong of false¹ imprisonment consists in the act of arresting or imprisoning any person without lawful justification, or otherwise preventing him without lawful justification from exercising his right of leaving the place in which he is.

2. The wrong of false imprisonment is in most cases that of assault also, but not necessarily so; locking a man up in a room in which he already is by his own act amounts to false

² *Lynch v. Knight* (1861) 9 H.L.C. at p. 598, *per* Lord Wensleydale. See *Dulieu v. White* (1901) 2 K.B. at p. 673, *per* Kennedy, J.

³ (1891) 28 L.R. Ir. 69.

¹ The term *false* is here used not in the ordinary sense of mendacious or fallacious, but in the less common though well established sense of erroneous or wrong, as in the phrases false quantity, false step, false taste, etc.

imprisonment, but is no assault. In any case imprisonment is so special a form of assault as to require separate classification and consideration.

3. To constitute the wrong in question there need be no actual imprisonment in the ordinary sense, *i.e.*, incarceration. It is enough that the plaintiff has been in any manner wrongfully deprived of his personal liberty. A mere unlawful arrest, for example, amounts in itself to false imprisonment, and so does any act whereby a man is unlawfully prevented from leaving the place in which he is : for example, a house or a ship.²

4. Nor is it needful that there should be any actual use of force. A threat of force, whereby the submission of the person threatened is procured, is a sufficient ground for such an action : for example, showing a man a warrant for his arrest and thereby obtaining his submission is itself an arrest, if it amounts to a tacit threat to execute the warrant by force if necessary ; *aliter* if it amounts merely to a request, with no threat or intent to use force.³

5. To constitute imprisonment the deprivation of the plaintiff's liberty must be complete ; that is to say, there must be on every side of him a boundary drawn, beyond which he cannot pass. It is no imprisonment to prevent him from going in some directions, while he is left free to go as far as he pleases in others. Thus no action for false imprisonment will lie for unlawfully preventing the plaintiff from going along the highway and compelling him to go back.⁴

6. To continue a lawful imprisonment longer than is justifiable is actionable as false imprisonment.⁵

7. The remedy for false imprisonment is not merely an action for damages, but the recovery of liberty by means of a writ of *habeas corpus*. The law as to this latter remedy

² *Warner v. Riddiford* (1858) 4 C.B. (N.S.) 180.

³ *Grainger v. Hill* (1838) 4 Bing. N.C. 212 ; *Arrowsmith v. Le Mesurier* (1806) 2 B. & P. N.R. 211, 9 R.R. 642 ; *Berry v. Adamson* (1827) 6 B. & C. 528.

⁴ *Bird v. Jones* (1845) 7 Q.B. 742 ; 68 R.R. 564.

⁵ *Mee v. Cruikshank* (1902) 86 L.T. 708 ; *Migotti v. Colvill* (1879) 4 C.P.D. 233.

pertains, however, to procedure, and cannot here be appropriately considered.

False imprisonment distinguished from malicious prosecution and abuse of process.

8. No action for false imprisonment will lie against a person who has procured the imprisonment of another by obtaining against him a judgment or other judicial order of a court of justice, even though that judgment or order is erroneous, irregular, or without jurisdiction. The proper remedy for wrongfully procuring the judicial imprisonment of the plaintiff is not an action for false imprisonment, but one for malicious prosecution or other malicious abuse of legal process, the nature of which we shall have to consider in a subsequent chapter. We shall there see that in an action of that description the plaintiff can succeed only if he proves both malice and the absence of any reasonable and probable cause for the proceedings complained of, whereas in an action for false imprisonment, just as in all other cases of trespass to person or property, liability is created, in general, even by honest and inevitable mistake. The rule, therefore, that no action for false imprisonment will lie against a litigant in respect of judicial imprisonment procured by him is a valuable protection against liability for error in the course of legal proceedings.

Thus in *Austin v. Dowling* ⁶ it is said by Willes, J.: "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon a magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment." Accordingly if the plaintiff has been wrongly arrested without warrant and taken before a magistrate, who remands him in custody, he must sue in respect of his imprisonment before the remand in an action for

⁶ (1870) L.R. 5 C.P. p. 540.

false imprisonment, but in respect of that which is subsequent to the remand in an action for malicious prosecution.⁷

9. The reason for this distinction is that a man cannot be sued in trespass, or therefore for false imprisonment, unless he himself, whether personally or by his agent, has done the act complained of. A court of justice, however, is not the agent of the litigant, but acts in the exercise of its own independent judicial discretion. Therefore the acts of a court of justice cannot be imputed to the litigant at whose suit they have been done. The litigant can be charged only with having maliciously and, without reasonable cause exercised his right of setting a court of justice in motion.⁸

10. This exemption of the litigant from any liability for false imprisonment extends even to cases in which the court ordering the imprisonment has acted without jurisdiction. It is the right of every litigant to bring his case before the court, and it is for the court to know the limits of its own jurisdiction and to keep within them.⁹

11. If, however, the litigant, after procuring a judicial order of imprisonment, proceeds to execute it by means of some ministerial officer whom he thereby makes his agent, he may thereby make himself responsible in an action for false imprisonment, if the order was one which ought not to have been made.¹⁰ Whether he will be so responsible or not depends on whether the order is of such a nature as, even though wrongful, to be a protection to those who act in reliance on it.

12. An action for false imprisonment will lie against any person who authorises or directs the unlawful arrest or deten-

⁷ *Lock v. Ashton* (1848) 12 Q.B. 871; 76 R.R. 434. See also *Elsee v. Smith* (1822) 1 D. & R. 97; 24 R.R. 639.

⁸ See *Brown v. Chapman* (1848) 6 C.B. 365, 76 R.R. 347; *West v. Smallwood* (1838) 3 M. & W. 418, 49 R.R. 666; *Hope v. Evered* (1886) 17 Q.B.D. 338; *Lea v. Charrington* (1889) 23 Q.B.D. 45, 272.

⁹ *Carratt v. Morley* (1841) 1 Q.B. 18, 55 R.R. 183; *West v. Smallwood* (1838) 3 M. & W. 418, 49 R.R. 666; *Brown v. Chapman* (1848) 6 C.B. 365, 76 R.R. 347.

¹⁰ *Painter v. Liverpool Gas Light Co.* (1836) 3 A. & E. 433; 42 R.R. 423.

tion of the plaintiff by a merely ministerial officer of the law, as distinguished from a judicial officer or court of justice. He who sets in motion a merely ministerial officer, such as a constable, has no protection similar to that which is extended to the litigant in a court of justice. He makes that ministerial officer his agent, and is responsible for any arrest or detention so procured or authorised, as if it were his own act. It is necessary, however, even in such a case to prove actual direction or authorisation, such as is sufficient to make the ministerial officer the agent of the defendant. Mere information given to such an officer, on which he acts at his own discretion, is no ground of liability.¹¹

Arrest on
suspicion
of felony.

13. What amounts to a lawful justification for arrest or other detention is not a matter which can here be fully considered. The most important case is the justifiable arrest of suspected criminals, and this pertains to the law of criminal procedure. It may be stated here, however, that at common law a person may lawfully arrest without warrant anyone whom he suspects on reasonable and probable grounds of having committed a felony. The question of reasonable and probable cause is, as in the analogous case of malicious prosecution a question for the judge and not for the jury.¹² There is a curious distinction between arrest by a private person and arrest by a constable. A private person justifying an arrest for a suspected felony must prove that a felony has actually been committed, whether by the person arrested or by some one else; and if in fact there has been no felony committed, it is no defence that there was reasonable and probable cause for believing the person arrested to be guilty. In the case of arrest by a constable, on the other hand, it is sufficient that there was reasonable and probable cause of suspicion, even if no felony has been in fact committed.¹³ Unlike the case of malicious prosecution it is not necessary for liability that the arrest should have been malicious; it is

¹¹ *Hopkins v. Crowe* (1836) 4 A. & E. 774, 43 R.R. 475; *Harris v. Dignum* (1859) 29 L. J. Ex. 23; *Grinham v. Willey* (1859) 4 H. & N. 496.

¹² *Lister v. Perryman*, 1870) L.R. 4 H.L. 521; *Hailes v. Marks* (1861) 7 H. & N. 56.

¹³ *Beckwith v. Philby* (1827) 6 B. & C. 635; 30 R.R. 484.

enough that it was without reasonable and probable cause.¹⁴ The burden of proving the existence of reasonable and probable cause is on the defendant.¹⁵ There is no authority at common law for arresting without warrant on suspicion of a misdemeanour,¹⁶ but by numerous statutory provisions power to effect such arrests is given in particular instances.

¹⁴ See *Hogg v. Ward* (1858) 27 L. J. Ex. 443; *Allen v. Wright* (1838) 8 C. & P. 522.

¹⁵ *Hicks v. Faulkner* 8 Q.B.D. at p. 170. Aliter in actions for malicious prosecution,

¹⁶ *Matthews v. Biddulph* (1841) 3 M. & G. p. 395.

CHAPTER XII.

LIABILITY FOR DANGEROUS PROPERTY.

The purpose of this chapter is to consider the liability of the owners and possessors of dangerous property for harm done by it to other persons. The matter falls into three divisions dealing (1) with dangerous premises, (2) with dangerous chattels, and (3) with animals.

In considering the liability of the owner or occupier of dangerous premises we are here concerned only with injuries suffered by persons¹ who enter on these premises and there come to harm; injuries suffered by outsiders—by persons who without entering on the premises come to harm elsewhere, (*e.g.*, in an adjoining highway or on the neighbouring land) by reason of the dangerous state of the premises—fall within the wrong of nuisance, and have been already sufficiently adverted to under that head. They are governed by quite different principles from those with which we are here concerned, and it is essential to bear in mind the distinction between these two classes of wrongs.

In dealing with dangerous premises we shall consider first the liability of the occupier and subsequently that of the owner.

§ 120.—Liability of Occupiers for Negligence.

The Rule in Indermaur v. Dames.

Duty of care
towards persons
entering
premises.

1. Subject to certain qualifications which we shall consider later, the duty of an occupier towards a person who lawfully enters upon the premises is a duty to use reasonable care for the safety of that person. He is bound to use reasonable care in ascertaining any dangers which exist on the premises, and to guard sufficiently against damage accruing therefrom.

This duty extends to all dangers which exist there, whether due to the nature of the premises or to the nature of the operations that are being carried on there.

The leading case on this matter is *Indermaur v. Dames*,¹ in which the occupier of a factory was held liable to the plaintiff, who was the servant of a gas-fitter employed by the defendant, and who, while testing certain gas-fittings on the premises, fell through an unfenced opening in one of the upper floors. It was contended that such a visitor enters at his own risk, and must take the premises as he finds them; but this contention was rejected. "With respect to such a visitor," it is said by the Court of Common Pleas, "we consider it settled law that he, using reasonable care on his own part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."² *Indermaur v. Dames.*

2. The rule in *Indermaur v. Dames* imposes upon the occupier of premises liability for the dangerous condition not merely of the land or buildings themselves, but also of the chattels which are upon the premises and are supplied for use there, even though, while being so used, they are no longer in the immediate possession and control of the occupier of the premises. Thus in *Heaven v. Pender*³ the defendants, a dock company, received a ship into their dock, and supplied for the use of the shipowners a staging to be slung by ropes at the ship's side in order that painters might stand there while painting the ship. The plaintiff, a painter employed by the *Heaven v. Pender.*

¹ (1866) L.R. 1 C.P. 274; 2 C.P. 311.

² L.R. 1 C.P. p. 288. For other examples of the general principle, see *The Moorcock* (1889) 14 P.D. 64; *The Calliope* (1891) A.C. 11; *The Apollo* (1891) A.C. 499; *Smith v. London & St. Katharine's Docks Co.* (1868) L.R. 3 C.P. 326; *Heaven v. Pender* (1883) 11 Q.B.D. 503; *Holmes v. N.E. Rly. Co.* (1869) L.R. 4 Ex. 254; *White v. France* (1877) 2 C.P.D. 308; *The Bearn* (1906) P. 48; *Bede Steamship Co. v. River Wear Commissioners* (1907) 1 K.B. 310.

³ (1883) 11 Q.B.D. 503.

shipowner, was injured through the dangerous condition of the staging, and was held by the Court of Appeal to have a good cause of action against the dock company in accordance with the rule in *Indermaur v. Dames*.

Effect of
knowledge
of danger.

*Smith v.
Baker.*

3. A difficult question relates to the effect of the circumstance that the danger is known to the person entering upon the premises. Can the plaintiff complain of injury which he has received from dangers which he knowingly faced, or is the duty of the occupier limited to dangers unknown to him who enters on the premises? In other words, is the duty of the occupier a duty to make the premises safe, or merely a duty to give warning that they are not safe? It is settled by the decision of the House of Lords in the leading case of *Smith v. Baker*⁴ that mere knowledge of the danger is not (at least in large and important classes of instances) any defence at all *per se*. In this case a workman in a quarry recovered damages from his employers for injury received from the fall of a stone, although he had continued to work in the quarry with full knowledge of the danger to which he was exposed through the negligent practice of the defendants in swinging stones over the quarrymen's heads by means of a crane. So in *Williams v. Birmingham Battery Co.*⁵ the defendants were held responsible by the Court of Appeal for the death of a workman who had fallen from a scaffolding which he had used with full knowledge of its dangerous character. So in *Lax v. Corporation of Darlington*⁶ the plaintiff recovered damages for the loss of a cow, which he had brought to the defendants' market and which had been injured by certain spiked railings, which, as the plaintiff well knew, existed in the market place.

Although a knowledge or warning of the danger is not in itself any bar to the action, it may nevertheless operate in at least two ways so as to exclude the liability of the occupier :

- (a) It may be sufficient evidence of an implied agreement by the plaintiff to take the risk upon himself : that is to say, to excuse the defendant from the performance of his duty to make the premises safe. *Volenti non*

⁴ (1891) A.C. 325.

⁵ (1899) 2 Q.B. 338.

⁶ (1879) 5 Ex.D. 28.

fit injuria. Whether such an agreement really exists, however, is a question of fact for the jury; to know of a breach of duty is not necessarily to excuse it.⁷

- (b) Knowledge of a danger may be evidence of contributory negligence on the part of the person injured by it. Acts which would be reasonable on the part of a visitor ignorant of a danger may be acts of contributory negligence on the part of one who knows of it.^{8 9}

4. The rule in *Indermaur v. Dames* is subject to two important exceptions. In the first place there is a class of cases in which the duty of the occupier is greater than that established by the general rule, and in the second place there is a class of cases in which the duty is less. The first of these exceptions may be conveniently referred to as the rule in *Francis v. Cockrell*¹⁰ and the second as the rule in *Gautret v. Egerton*.¹¹ We proceed to consider these rules in the succeeding sections.

Exceptions
to the rule in
Indermaur v.
Dames

⁷ *Smith v. Baker* (1891) A.C. 325; *Williams v. Birmingham Battery Co.* (1899) 2 Q.B. 338.

⁸ All this matter has been more fully discussed in connection with the maxim *Volenti non fit injuria*. *Supra*, p. 48. In *Griffiths v. London & St. Katharine's Docks Co.* (1884) 13 Q.B.D. 259, the opinion is expressed that a servant who suffers injury through the unsafe condition of his master's premises must prove both that his master knew of the danger, and that he himself was ignorant of it. It seems impossible now to maintain either branch of this rule. See *Lloyd v. Woolland Brothers* (1902) 87 L.T. 73.

⁹ It is possible that the principle of *Smith v. Baker* (1891) A.C. 325, applies not universally, but only to those plaintiffs who enter on the premises *by right* (for example, under a contract, as in the case of master and servant), and that in the case of those who enter not of right, but only by leave and licence (for example, a customer entering a shop), knowledge of the danger is *per se* an absolute bar to an action. It may be that he who enters by permission only has no right that the premises shall be safe, but has merely a right to be warned of dangers; whereas he who enters as of right has an accessory right that after entering he shall not be exposed to danger, and his knowledge of a breach of the occupier's duty in this matter does not in itself excuse it, but is merely evidence for a jury of an implied agreement to that effect. This distinction seems sound in principle, but it considerably complicates the law, and the authorities are not sufficient to show whether it exists. See Clerk & Lindsell on Torts, p. 482, 4th ed.

¹⁰ (1870) L.R. 5 Q.B. 184, 501. ¹¹ (1867) L.R. 2 C.P. 371.

§ 121.—Liability of Occupiers on a Warranty of Safety.

*The Rule in Francis v. Cockrell.*¹

Warranty
of safety.

1. When the occupier of premises agrees for valuable consideration that some other person shall have a right to enter and use them for some specific purpose, the contract contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of any one can make them. He is responsible, therefore, not merely for any dangers due to the negligence of himself or his servants, but also for those which are due to that of independent contractors or other persons.

Francis v.
Cockrell.

2. This is the principle established in the leading case of *Francis v. Cockrell*.¹ The defendant, in occupation of a racecourse, contracted with a builder for the erection of a stand thereon. The plaintiff purchased from the defendant a ticket entitling him to enter the stand to see the races. Through the negligence of the contractor the stand was improperly constructed, and during the races it fell and injured the plaintiff who was upon it. It was held by the Court of Exchequer Chamber that the defendant was liable, although guilty of no negligence, by virtue of the implied warranty of safety contained in his contract with the plaintiff. "First there is the principle," says Kelly, C.B.,² "which I hold to be well established by all the authorities, that one who lets for hire or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over, or a stand from which to view a steeplechase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant and does impliedly contract that the article or thing is reasonably fit for the purpose to which it is to be applied; but secondly he does not contract against any unseen and unknown defect which cannot be discovered or which may be said to be undiscoverable by any ordinary or reasonable means of inquiry and examination."

¹ (1870) L.R. 5 Q.B. 184, 501.

² *Ibid.*, p. 508.

3. It has sometimes been suggested that this implied warranty of safety is the general rule as to the liability of occupiers, and not merely a special exception derived from the law of contract.³ There seems, however, to be no sufficient authority for any such generalisation of the rule in *Francis v. Cockrell*. There is no suggestion of any such liability in *Indermaur v. Dames*⁴ or in the other cases which form the foundation of this part of the law. It is submitted, therefore, that a person who enters lawfully, but not in pursuance of any contract by which for valuable consideration he has purchased a right to the use of the premises, has not the protection of any such rule of absolute liability, but has merely the right that due care shall be taken for his safety by the occupier and his servants. A master does not warrant to his servant that the premises are safe; still less does a shop-keeper enter into any such warranty with his customers.

Where there
is no war-
ranty.

§ 122.—Liability of Occupiers to Bare Licensees.

*The Rule in Gautret v. Egerton.*¹

1. There is a certain class of persons—distinguished as bare licensees or mere licensees—to whom an occupier owes no such duty of care as is established by the rule in *Indermaur v. Dames*. His only duty is to give warning of any *concealed danger of which he actually knows*. As the rule is often stated, his only duty is to refrain from knowingly leading the plaintiff into a trap by allowing him to enter without warning premises which he, the occupier, actually knows to be unsafe. But he is under no duty to make them safe, or even to ascertain whether they are safe or not.

Duty to bare
licensees.

Presumably, however, the knowledge of any servant to whom the occupier has delegated the performance of his duty to the plaintiff is equivalent to the knowledge of the occupier himself.²

³ See *Marney v. Scott* (1899) 1 Q.B. p. 989, *per* Bigham, J.

⁴ (1866) L.R. 1 C.P. 274; 2 C.P. 311.

¹ (1867) L.R. 2 C.P. 371.

² Cf. the rules as to proof of *scienter* in the case of dangerous animals. *Infra*, § 126.

A *concealed* danger within the meaning of this rule of disclosure is a danger which is unknown to the plaintiff, and is of such a nature that a reasonably prudent man in the position of the plaintiff would not anticipate it or guard against it.

Who are bare licensees.

2. What classes of persons, then, are bare licensees within the meaning of this rule? A bare licensee may be defined as a person who enters on the premises by the permission of the occupier, granted gratuitously in a matter in which the occupier has himself no interest. The typical example is a gratuitous license to use a way across the occupier's land for purposes which exclusively concern the licensee himself. He who asks and receives such a favour is deemed to enter on the terms that he agrees to take the premises as he finds them. He is to look after himself, and can make no claim to be looked after by the occupier.

In order that a person shall be deemed a bare licensee two conditions, therefore, must be fulfilled :

- (a) The license must be gratuitous: if he pays for his right to enter, he purchases at the same time a right of safety.
- (b) The license must be granted in a matter in which the occupier has himself no interest. If there is a common interest—if the permission is a matter of business, and not a matter of grace and favour—the person so entering is entitled to safety, even though the permission granted to him is gratuitous.

Gautret v. Egerton.

3. The leading case as to the rights of bare licensees is *Gautret v. Egerton*,³ in which it was held that the defendants, who had gratuitously permitted the public to use a way through certain docks, were not bound to make this way safe, or liable to any one who suffered damage in consequence of its dangerous condition. "If I dedicate a way to the public," says Willes, J.,⁴ "which is full of ruts and holes, the public must take it as it is. If I dig a pit in it, I may be liable for the consequences, but if I do nothing I am not." So in *Hounsell v. Smyth*⁵ the defendants were the occupiers of certain waste lands on which there was an unfenced quarry, and they tacitly

³ (1867) L.R. 2 C.P. 371.

⁴ At p. 373.

⁵ (1860) 7 C.B. (N.S.) 731.

allowed the public to cross this land as a short cut between two highways. They were held not liable to a person who, being ignorant of the existence of the danger, crossed the waste on a dark night and fell into the quarry. In *Southcote v. Stanley*⁶ a guest was held to be a bare licensee within the same principle, and failed to recover damages from his host for injuries suffered through the breaking of a glass door which had been left in a dangerous condition.

4. The following passage from the judgment of Willes, J., in *Indermaur v. Dames*⁷ explains and illustrates the distinction between bare licensees and other classes of persons: "It was also argued that the plaintiff was at best in the condition of a bare licensee or guest, who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the colour of ingratitude so long as there is no design to injure him. We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. . . . The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation express or implied. The common case is that of a customer in a shop; but it is obvious that this is only one of a class; for whether the customer is actually chaffering at the time, or actually buys or not, he is according to an undoubted course of authority and practice entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know. . . . This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerns him-

⁶ (1856) 1 H. & N. 247.

⁷ (1866) L.R. 1 C.P. at pp. 285, 287, 288.

self. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier and upon his invitation express or implied."⁸

License distinguished from gratuitous contract.

5. The position of a bare licensee must be distinguished from that of a person for whom the occupier has undertaken, even though gratuitously, to perform some service: for example, a gratuitous contract of carriage. Such a contract imposes a duty of reasonable care in the performance of it, and this duty will extend to ascertaining the safe condition of the premises on which the contract is to be performed.

Thus in *Harris v. Perry*⁹ the plaintiff recovered damages for injuries received in a collision due to the negligence of the defendant's servants in leaving an obstruction on the track, although he was being carried gratuitously on the defendant's railway.

Duty to licensee after entry.

6. What is the duty of an occupier towards a bare licensee after he has entered on the premises? This seems not to have been fully considered, but it is clear that the occupier is liable if he knowingly creates a new source of concealed danger and gives no warning of it.¹⁰ Presumably he is also liable if he or his servants do any positive act of negligent misfeasance by which the licensee suffers harm, as by negligently

⁸ See also as to bare licensees, *Smith v. London & St. Katharine's Docks Co.* (1868) L.R. 3 C.P. 326; *The Apollo* (1891) A.C. 499; *White v. France* (1877) 2 C.P.D. 308; *Holmes v. N.E. Rly. Co.* (1869) L.R. 4 Ex. 254; *Corby v. Hill* (1858) 4 C.B. (N.S.) 556; *Sullivan v. Waters* (1864) 14 Ir. C.L.R. 460.

⁹ (1903) 2 K.B. 219.

¹⁰ *Corby v. Hill* (1858) 4 C.B. (N.S.) 556.

driving over a person whom he has permitted to use a private way. "The grantee," says Cockburn, C.J., in *Gallagher v. Humphrey*,¹¹ "must use the permission as the thing exists. It is a different question, however, where negligence on the part of the person granting the permission is superadded. It cannot be that, having granted permission to use a way subject to existing dangers, he is to be allowed to do any further act to endanger the safety of the person using the way. The plaintiff took the permission to use the way subject to a certain amount of risk and danger, but the case assumes a different aspect when the negligence of the defendant—for the negligence of his servants is his—is added to that risk and danger."¹²

§ 123.—Liability of Occupiers to Trespassers.

1. Hitherto we have confined our attention to the rights of persons who lawfully enter on dangerous premises and there come to harm. We have now to deal with the position of mere trespassers. The general principle is that he who enters wrongfully enters at his own risk in all respects. A burglar who breaks his leg by falling down the stairs cannot complain that they were insecure, nor can a beggar recover damages because he is bitten by the dog.¹ To a trespasser the occupier owes no duty either to see that his premises are safe, or to give warning of their danger—not even that limited duty of warning which he owes to a bare licensee.

No duty of
care towards
trespassers.

In *Ponting v. Noakes*² the plaintiff and defendant were adjoining occupiers of land, and the defendant had a yew tree growing on his land, the branches of which extended close up to the boundary line but did not cross it. The plaintiff's horse, reaching across the boundary, ate the leaves of the yew tree and died in consequence. It was held that the defendant was

¹¹ (1862) 6 L.T. (N.S.) p. 685.

¹² The decision in *Batchelor v. Fortescue* (1883) 11 Q.B.D. 474, is not in conflict with this principle, for the plaintiff in that case had no right or permission to be where he was when the accident happened to him.

¹ *Sarch v. Blackburn* (1830) 4 C. & P. 297; 34 R.R. 805.

² (1894) 2 Q.B. 281.

under no liability, since he owed no duty of care in respect of trespassing animals.³

Intentional
harm to
trespassers.

2. This general principle is subject, however, to two qualifications. The first is that an occupier who intentionally harms a trespasser by creating on his premises a source of danger for that purpose is liable for the harm so done. A man does not forfeit his legal rights by becoming a trespasser, and is not *caput lupinum* to be treated as the occupier pleases. I must not throw stones at a man because he crosses my land without permission; and for the same reason I must not intentionally lay a trap for him, whereby he may, when trespassing, bring mischief upon himself. Thus in *Bird v. Holbrook*⁴ the defendant placed a spring gun in his garden to protect it from the depredations of thieves and trespassers. The plaintiff was a boy who, in ignorance of the fact that any such danger existed, trespassed in the garden in order to recapture a fowl which had strayed there. While so trespassing he was injured by the discharge of the gun, and he was held to have a good cause of action. This case was decided at common law, the cause of action having arisen before the passing of the Act which made the setting of spring guns a criminal offence.⁵ In the earlier case of *Ilott v. Wilkes*⁶ the facts were identical, except that the plaintiff knew of the existence of the danger, and it was held that this knowledge prevented him from having any remedy. It is difficult to see on what principle such a decision can be supported. It seems an anomalous and incorrect application of the maxim *Volenti non fit injuria*. If a man intentionally shoots me, am I debarred from an action because I knew of his intention and faced the risk?

³ Nevertheless it is an actionable wrong to place anything on one's land for the purpose of attracting and injuring the animals of the adjoining occupier. *Townsend v. Wathen* (1808) 9 East 277, 9 R.R. 553. It is also actionable to have on one's premises any excavation or other danger so close to the adjoining highway as to interfere with the safety of passengers, even though mischief cannot happen to them except by accidental deviation from the highway and resulting trespass on the defendant's land. *Barnes v. Ward* (1850) 9 C.B. 392, 82 R.R. 375.

⁴ (1828) 4 Bing. 628; 29 R.R. 657.

⁵ 7 & 8 Geo. IV. c. 18. See now 24 & 25 Vict. c. 100, s. 31.

⁶ (1820) 3 B & Ald. 304, 22 R.R. 400.

3. A second qualification is that the occupier is probably liable even to a trespasser for positive acts of negligent misfeasance done by himself with knowledge of the trespasser's presence. The occupier's exemption from any duty of care to a trespasser applies only to the dangerous state of the premises, not to acts done on the premises with knowledge of the trespasser's presence. He who shoots upon his land owes a duty of care not only to persons lawfully there, but to trespassers whom he knows to be there.⁷

4. It is sometimes difficult to distinguish between a trespasser and a person entering lawfully by the tacit permission of the occupier. Thus the occupier tacitly invites and permits certain classes of persons to enter his garden gate and come to the front door. If his dog bites a person so entering, liability will depend on whether that person falls within the class of persons so tacitly invited; for otherwise he is a mere trespasser to whom no duty is owing. Who then are thus entitled to enter, and to complain of injuries received? What shall be said, for example, of hawkers, beggars, tract distributors, canvassers, strangers entering to ask their way? The only acceptable conclusion would seem to be that no person is to be accounted a trespasser who enters in order to hold any manner of communication with the occupier or any other person on the premises, unless he knows or ought to know that his entry is prohibited.

§ 124.—Liability of the Owner of Premises.

1. Apart from any express contract to that effect, a landlord owes no duty, either towards his tenant or towards any other person who enters on the premises during the tenancy, to take care that the premises are safe either at the commencement of the tenancy or during its continuance.¹

Thus in *Sutton v. Temple*² the defendant granted to the plaintiff a lease of land for grazing purposes. The plaintiff's cattle when put on the land died from the poisonous effect of certain refuse paint, accidentally mixed with the manure which,

⁷ See *Petrie v. Rostrevor Owners* (1898) 2 Ir. R. 556.

¹ *Lane v. Cox* (1897) 1 Q.B. 415.

² (1843) 12 M. & W. 52; 67 R.R. 255.

before the commencement of the tenancy, had been spread upon the land. It was held that the tenant was nevertheless liable for the full rent, there being in a lease of land no such implied warranty of fitness as there is in the hiring of a chattel.³

Aliter with furnished house.

2. The letting of a furnished house or of furnished apartments is, however, an exception to this rule. Such an agreement contains an implied warranty and condition that the premises are at the commencement of the tenancy fit for immediate occupation. If they are not so fit, the tenant may determine the tenancy or sue for damages in respect of any injury suffered.⁴

Duty to disclose known dangers.

3. It is submitted that notwithstanding the general principle above stated a landlord is bound to give notice to his tenant of any concealed danger existing at the commencement of the tenancy and actually known to the landlord. It can scarcely be the case that a tenant is in a worse position in this respect than a bare licensee.⁵

Landlord occupying part of building.

4. Where a landlord lets merely a part of a building and retains the rest in his own *occupation*, even though the tenant may have the *use* of it, the landlord is subject in respect of the part so retained by him to the usual obligations and liabilities of an occupier, both as regards his own tenant and as regards strangers. Thus in *Miller v. Hancock*⁶ the defendant owned a building the different floors of which were let as chambers or offices, while the staircase remained in the possession of the defendant. The plaintiff entered the building for the purpose of collecting a debt due by one of the tenants, and there fell and broke his leg in consequence of the dangerous disrepair of the staircase. It was held by the Court of Appeal that the defendant was liable, and it seems clear that he would have

³ See also *Keates v. Cadogan* (1851) 10 C.B. 591.

⁴ *Smith v. Marrable* (1843) 11 M. & W. 5, 63 R.R. 493; *Wilson v. Finch Hatton* (1877) 2 Ex.D. 336. This warranty does not extend to defects arising after the commencement of the tenancy. *Sarson v. Roberts* (1895) 2 Q.B. 395.

⁵ The liability of a landlord towards an intending tenant who is inspecting the premises falls within the rule in *Indermaur v. Dames*. *Wright v. Lefever* (1903) 51 W.R. 149. ⁶ (1893) 2 Q.B. 177.

ally liable if the plaintiff had been one of his tenants of a stranger.⁷

MW?

The landlord's exemption from liability for dangers on premises in the occupation of his tenant extends merely to injuries suffered by the tenant himself, but to injuries suffered by other persons entering on the premises during tenancy.⁸ The lease transfers all obligations towards persons from the landlord to the tenant.

Landlord not liable to strangers.

This is so even if the landlord has by contract with the tenant taken upon himself the duty of keeping the premises in repair. Such a contract is *res inter alios acta* and confers upon the tenant no rights against the landlord which they would have had without it.^{9 10}

§ 125.—Liability for Dangerous Chattels.

1. Liability for damage done by dangerous chattels is to be considered under three heads :—

Liability of possessor of a dangerous chattel.

- (a) The liability of the possessor of a chattel to persons permitted or invited to make use of it.
- (b) The liability of him who delivers a chattel for damage suffered by the recipient of it.
- (c) The liability of him who delivers a chattel for damage suffered by other persons than the recipient.

2. As to the first of these cases the same rules which determine the liability of the occupier of dangerous premises to persons entering upon them determine also the liability of the possessor of a dangerous chattel who, while still retaining the possession of it, allows or invites other persons to make use of it : for example, a ship, railway train, or other conveyance. A shipowner who allows a person to enter his ship owes

⁷ See also *Hargroves v. Hartopp* (1905) 1 K.B. 472. The case of *Ivay v. Hedges* (1882) 9 Q.B.D. 80, is insufficiently reported, and it is not clear what the precise facts or the grounds of the decision were. To reconcile it with *Miller v. Hancock* we must assume that the dangerous condition of the railing was known not only to the defendant but to the plaintiff himself.

⁸ *Lane v. Cox* (1897) 1 Q.B. 415.

⁹ *Cavalier v. Pope* (1906) A.C. 428.

¹⁰ As to the liability of the landlord towards outsiders, as opposed to persons entering on the premises, see p. 218, above.

towards him the same duty as he who allows a person to enter his house. The rules in *Indermaur v. Dames*,¹ *Francis v. Cockrell*², and *Gautret v. Egerton*³ are equally applicable to all forms of dangerous property, fixed or movable, so long as it remains in the possession of the defendant.⁴

Liability for delivery of a dangerous chattel.

3. Where, in the second place, a dangerous chattel is *delivered* by the defendant to the plaintiff, the liability of the defendant depends on the terms, express or implied, of the contract between them. The extent of responsibility varies in different classes of contracts. Thus in a contract of sale there is in many cases an implied warranty that the goods are fit for the purpose for which they are bought.⁵ In such cases the seller is responsible in damages for any injury caused by a dangerous imperfection in the goods, apart altogether from any negligence.⁶ In a contract for the hiring of chattels there is a similar warranty of fitness and safety, and a similar liability for dangerous defects.⁷ In other contracts there is in general no implied warranty, but merely a duty to use care, so that the defendant is not liable except for the negligence of himself and his servants. This, for example, is the measure of the duty and liability of him who delivers a chattel to his servant.⁸

Gratuitous bailments and gifts.

4. In the case of a gratuitous loan or gift of a chattel, on the other hand, there is not even a duty of reasonable care. The donor or lender of a chattel owes no duty except to give warning of any dangers actually known to him. In this respect the position of the recipient is the same as that of a bare licensee in the case of dangerous premises. "The principle

¹ (1867) L.R. 2 C.P. 311 ² (1870) L.R. 5 Q.B. 501.

³ (1867) L.R. 2 C.P. 371.

⁴ *Smith v. Steele*, L.R. 10 Q.B. 125; *Marney v. Scott* (1899) 1 Q.B. 986; *Readhead v. Midland Rly. Co.* (1869) L.R. 4 Q.B. 379.

⁵ Sale of Goods Act, 1893, s. 14.

⁶ *Randall v. Newson* (1877) 2 Q.B.D. 102; *Priest v. Last* (1903) 2 K.B. 148; *Frost v. Aylesbury Dairy Co.* (1905) 1 K.B. 608.

⁷ *Hyman v. Nye* (1881) 6 Q.B.D. 685. The warranty in contracts of hiring does not extend to latent defects which are not discoverable by reasonable care on the part of any one.

⁸ As to the liability of him who delivers a dangerous chattel to a carrier see *Brass v. Maitland* (1856) 6 E. & B. 470.

of law as to gifts," says Willes, J., in *Gautret v. Egerton*,⁹ "is that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time and omitted to caution the donee." "Knowledge of the defect," says Smith, L.J., in *Coughlin v. Gillison*.¹⁰ "is an essential to the right of the borrower to recover where he has been injured by reason of the article not being fit for the purpose for which it was lent."

5. A contract of gratuitous service, however, such as one of *Aliter with carriage*, involves a duty of reasonable care, and must therefore be distinguished from a contract of gratuitous bailment *contract of gratuitous service* or a gift, which does not. He who lends a carriage to a friend is not bound to ascertain its safe condition; but he who undertakes to take his friend for a drive in his carriage apparently is so bound.¹¹ We have already noticed a similar distinction in the case of bare licensees.¹²

6. The recipient of a chattel may expressly agree to run *Agreement to run all risks*, all risks, and in this case there is no duty even to disclose concealed dangers actually known. Thus in *Ward v. Hobbs*¹³ the defendant sold to the plaintiff at auction a herd of pigs which to the knowledge of the defendant were infected with typhoid fever. In the conditions of sale it was provided that the animals were to be sold and taken with all faults, and no disclosure of the danger was made. The pigs died, and infected other pigs belonging to the plaintiff, which also died; yet it was held by the House of Lords that he had no cause of action.¹⁴

7. It remains to consider the liability of him who delivers *Liability to third persons on delivery of dangerous chattels*, a dangerous chattel for damage suffered, not by the recipient himself, but by some third person. When A, for example, sells or gives a defective gun to B, who sells or gives it to C, who is injured by the bursting of it, is A under any liability to

⁹ (1867) L.R. 2 C.P. p. 375. ¹⁰ (1899) 1 Q.B. p. 147.

¹¹ *Lygo v. Newbold* (1854) 9 Ex. p. 305, *per* Parke, B.; *Harris v. Perry* (1903) 2 K.B. 219; *Moffatt v. Bateman* (1869) 3 P.C. 115.

¹² *Supra*, p. 354.

¹³ (1878) 4 A.C. 13.

¹⁴ On the other hand a sale expressly excluding *all warranties*, merely, leaves subsisting a duty to disclose known dangers. *Clarke v. Army & Navy Co-operative Society* (1903) 1 K.B. 155.

C? The rule seems to be that there is no liability at all except in two cases :—

Fraud.

(a) The defendant is responsible if he fraudulently represents the chattel to be safe, and so misleads the recipient into causing damage to the plaintiff. Thus in *Langridge v. Levy*¹⁵ the defendant sold to the plaintiff's father for the use of the plaintiff a gun which he fraudulently stated to be of good construction, and the plaintiff, having been injured by the bursting of the weapon, was held entitled to sue the seller for damages, although there was no contract between them. This is simply a special application of the general principle, which we shall consider in a subsequent chapter, that damage done to one person by fraudulently deceiving another is an actionable tort.

Non-disclosure of known dangers.

(b) If the defendant has actual knowledge of the dangerous nature of the chattel delivered by him, and gives no warning of it to the recipient, he is liable for resulting injury to third persons. "Anyone," says Cotton, L.J., in *Heaven v. Pender*,¹⁶ "who . . . without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act." That is to say, he who delivers a dangerous chattel owes to third persons the same duty of care (but no more) that he owes to the recipient himself in the case of a gift or gratuitous bailment.¹⁷ Thus in *Farrant v. Barnes*¹⁸ the

¹⁵ (1837) 2 M. & W. 519; 46 R.R. 689.
at p. 517.

¹⁶ (1883) 11 Q.B.D.

¹⁷ See also *Earl v. Lubbock* (1905) 1 K.B. at p. 258, *per* Stirling, L.J. It is submitted that the decision to the contrary in *Blakemore v. Bristol & Exeter Rly. Co.* (1858) 8 E. & B. 1035, is erroneous. In that case the defendant railway company, having full knowledge that a crane on their railway station was defective and dangerous, lent it gratuitously for use by a consignee for the purpose of unloading his goods, and while being used for this purpose by a servant of the consignee the crane broke and killed the servant. It was held by the Court of Queen's Bench that his administratrix had no action under Lord Campbell's Act against the company. It was admitted that the company would have been liable for injury to the consignee to whom the crane was lent; but it was held that they were not liable to third persons, even though it was known that the crane would be so used by them and that it was

defendant delivered to a carrier a carboy of nitric acid without informing him of the dangerous nature of its contents, and was held liable in damages to the carrier's servant who was injured by the bursting of the carboy while he was carrying it on his shoulders.

8. Save in these two cases of fraud and non-disclosure of known dangers, he who delivers a dangerous chattel owes no duty and incurs no liability to third persons. This is so even if he has taken on himself by contract with the recipient the duty of using care to make the chattel safe. Such a contract is *res inter alios acta* and confers no rights on others. This was decided by the Court of Exchequer in *Winterbottom v. Wright*¹⁹ and by the Court of Appeal in *Earl v. Lubbock*.²⁰ In this last case the defendant contracted with the owner of a van to put it in repair, and he performed his contract so negligently that when the plaintiff, the servant of the owner, was driving the van, one of the wheels came off and the plaintiff was thrown to the ground and injured. It was held that he had no cause of action against the defendant. The facts in *Winterbottom v. Wright* are practically the same.²¹

It is perhaps to be regretted that so narrow a view has been taken as to the liabilities of those who negligently put dangerous chattels in circulation to the hurt of other persons. It would seem no less consistent with legal principle than with natural justice, that he who by a negligent breach of his contractual duty has put into the hands of another person a danger-

dangerous. The approval of this case in *Coughlin v. Gillison* (1899) 1 Q.B. 145, extends only to the proposition that the gratuitous lender of a chattel is liable to the recipient if, and only if, the lender knows of its dangerous nature.

¹⁹ (1862) 11 C.B. N.S. 553.

²⁰ (1842) 10 M. & W. 109; 62 R.R. 534. ²¹ (1905) 1 K.B. 253.

²¹ Since the establishment of the authority of *Winterbottom v. Wright* by *Earl v. Lubbock* it seems impossible any longer to maintain the authority of such cases as *George v. Skivington* (1869) L.R. 5 Ex. 1, and *Elliott v. Hall* (1885) 15 Q.B.D. 315. *Heaven v. Pender* 11 Q.B.D. 503 is to be explained on the ground that the dangerous chattel which did the mischief in that case was being used on premises in the occupation of the defendants and therefore constituted a danger existing on these premises, so as to create liability under the rule in *Indermaur v. Dames* (1867) L.R. 2 C.P. 311. See p. 347, above.

ous chattel which that other believes and is entitled to believe to be safe, should be liable to any third person who in the natural and probable course of events is injured in consequence. The result of the rule established by *Earl v. Lubbock* is sufficiently remarkable, namely, the total denial of any legal redress to him who is injured by using a chattel in reliance on the due and careful performance of a contract between the person from whom he received it and some third person.

Delivery of dangerous chattels to children.

9. The foregoing rules are not applicable without qualification when dangerous chattels are delivered to children under the age of discretion. A person in possession of a dangerous instrument, such as a loaded gun, is liable if he delivers it to, or negligently allows it to be taken by, a child who does mischief with it.²²

§ 126.—Liability for Animals.

Knowledge of dangerous character must exist.

1. Liability for harm done by animals has been subject from early times to a special rule which is not applicable to other forms of dangerous property. In other cases, as we have seen, a person is commonly bound to take care to ascertain whether his property is safe or not, and is responsible not only for the dangers which he knows, but also for those which he ought to have known. In the case of an animal, on the other hand, the owner is not under any obligation to find out whether it is dangerous or not. He is responsible only for dangers which he knows, not for those which he might have ascertained by care. Unless he has knowledge to the contrary, he is entitled absolutely to assume that an animal will do no harm.

Knowledge either proved or presumed.

2. The knowledge which is thus an essential condition of liability for the acts of animals is of two kinds. It is either (1) knowledge proved as a fact in the individual case, or (2) knowledge conclusively presumed by law from the fact that the act done by the animal is of a kind which animals of that species have a natural tendency to commit. In other words all harm done by animals is of two kinds: (1) harm which is natural to that species of animal, (2) harm which is not natural

²² *Dixon v. Bell* (1816) 5 M. & S. 198, 17 R.R. 308; *Lynch v. Nurdin* (1841) 1 Q.B. 29, 55 R.R. 191; *Williams v. Eady* (1893) 10 T.L.R. 41; *Sullivan v. Creed* (1904) 2 Ir. R. 317.

to the species, but which is nevertheless done by the particular animal in question. In the first case the owner of the animal is not permitted to allege that he did not know of its tendency to do the mischief; he is conclusively presumed to have known the ordinary character of that species of animal, nor is it any defence to him that he had good reason to believe that the individual animal had no tendency to do such harm, although natural to the species.¹ In the second case, on the other *Scienter*. hand, actual knowledge of the tendency of the individual animal to do the harm which it did do must be proved by the plaintiff. Such proof is technically called proof of the *scienter*, from the term *scienter* used in the old writ and declaration, in which the defendant was charged with *knowingly* keeping a dangerous animal.

Thus it is a natural tendency of cattle to stray and trespass, and eat and tread down crops, and it is the natural tendency of tigers and other wild beasts to attack mankind and other animals. In such a case, therefore, no proof of *scienter* is necessary.² Knowledge is presumed by law, and this presumption is conclusive, so as even to exclude evidence that the individual animal was reasonably believed to have no tendency to act after the manner of its kind.

On the other hand it is not the natural tendency of dogs to bite human beings; therefore it is necessary for the plaintiff in such a case to prove that the defendant actually knew that the dog was dangerous and had departed from the peaceable habit of its species. And it is not sufficient to prove that he had the means of knowing this, and would have known it had he exercised reasonable care.³

In the first class of cases, knowledge need not be proved and care is no defence; in the second, knowledge must be proved, and negligence is no ground of liability.

3. Whether any particular kind of mischief is natural or Character of animals a question of law. Thus it is a rule of law and not a mere proposition of law. fact that it is not natural for a dog to bite mankind. "The

¹ *Filburn v. People's Palace Co.* (1890) 25 Q.B.D. 258.

² *May v. Burdett* (1846) 9 Q.B. 101, 72 R.R. 189: *Filburn v. People's Palace Co.* (1890) 25 Q.B.D. 258.

³ *Mason v. Keeling* (1699) 12 Mod. 332.

law," says Lord Holt,⁴ "takes notice that a dog is not of a fierce nature, but rather the contrary." So it has been decided that it is natural for strange horses to kick one another when left at large in a field,⁵ or for a stallion to bite and kick a mare,⁶ but that it is not natural for a horse straying in the highway to kick a human being.⁷ So it is in the nature of an elephant to attack human beings,⁸ but it is not natural for a bull to do so.⁹

Dogs.

4. At common law it was deemed not to be in the nature of a dog to attack sheep or cattle, and in such cases proof of *scienter* was accordingly required. On this point, however, the law has been altered by the Dogs Act, 1906, by which it is provided that "the owner of a dog shall be liable in damages for injury done to any cattle by that dog, and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such previous propensity, or to show that the injury was attributable to neglect on the part of the owner."¹⁰ The word cattle in this statute includes horses, mules, asses, sheep, goats, and swine.¹¹ Liability for all other kinds of mischief done by dogs stands as at common law.

Rule different in cases of contract.

5. The exemption of the owner of an animal from all duty of care as to its dangerous character exists only in the law of torts, and not in the law of contracts. He who by contract undertakes any duty of care with respect to the person or property of another must show due care to prevent damage by mischievous animals, and no proof of *scienter* is required. Thus in *Smith v. Cook*¹² the bailee of a horse was held liable for damage done to it by a bull without any proof of *scienter*.

Remoteness of damage.

6. Even though the act of the animal may be natural to the species, or known to be natural to the individual, the dam-

⁴ *Mason v. Keeling* (1699) 12 Mod. p. 335.

⁵ *Lee v. Riley* (1865) 18 C.B. (N.S.) 722.

⁶ *Ellis v. Loftus Iron Co.* (1874) L.R. 10 C.P. 10.

⁷ *Cox v. Burbidge* (1863) 13 C.B. (N.S.) 430.

⁸ *Filburn v. People's Palace Co.* (1890) 25 Q.B.D. 258.

⁹ *Hudson v. Roberts* (1851) 6 Ex. 697.

¹⁰ Dogs Act, 1906, s. 1, s-s. 1. A similar provision was contained in an earlier Act, 28 & 29 Vict. c. 60.

¹¹ s. 7.

¹² (1875) 1 Q.B.D. 79.

age resulting from the act may be too remote to be the ground of liability. Thus in *Saunders v. Teape*¹³ the defendant's dog jumped over a low wall into a garden and fell down a well upon the plaintiff, who was at the bottom of the well, engaged in digging it. It was held that the defendant was not liable; the damage was clearly too remote.

7. In proving the *scienter* it is not necessary to prove that the animal has on any previous occasion actually done the kind of harm now complained of; it is sufficient that it has sufficiently manifested a tendency to do it, and that the defendant was aware of the fact.¹⁴ Evidence of
scienter.

8. In proving the *scienter* the knowledge of any servant who has the custody or care of the animal, or whose duty it is to attend to the matter, is deemed equivalent to the knowledge of his master.¹⁵

9. Provided that there exists the necessary knowledge of danger in accordance with the rule which we have been considering, the person who keeps an animal is absolutely responsible for its acts. That is to say, he is bound at his peril to prevent it from going at large or in any other manner having an opportunity of exercising its mischievous instincts. If any harm is done by it, he is *prima facie* liable without any allegation or proof of negligence in the custody or care of it.¹⁶ Absolute
responsi-
bility for
animals.

It is not true, indeed, that the act of keeping such an animal is in itself wrongful. To keep a show of wild beasts is a perfectly lawful business, no less than the keeping of cattle, yet tigers and cows will both do mischief after the custom of their kind, if they are allowed the opportunity. But the keeping of these animals, though not wrongful, is a ground of absolute liability, independent of negligence.

¹³ (1884) 51 L.T. (N.S.) 263.

¹⁴ *Worth v. Gilling* (1866) L.R. 2 C.P. 1.

¹⁵ *Baldwin v. Casella* (1872) L.R. 7 Ex. 325; *Applebee v. Percy* (1874) L.R. 9 C.P. 647.

¹⁶ *May v. Burdett* (1846) 9 Q.B. 101; 72 R.R. 189. Harm done by an animal of its own motion must be distinguished from harm done by the defendant himself in the management of the animal. He who drives a horse is not absolutely liable if it runs over the plaintiff; he is liable only for his own negligence in driving it. *Holmes v. Mather* (1875) L.R. 10 Ex. 261.

Circumstances excluding liability.

10. This absolute liability of the keeper of animals may, however, be excluded by certain circumstances of excuse or justification, though it is not easy in the present state of the law to say what they are.

Contributory negligence.

(a) Contributory negligence on the part of the plaintiff is doubtless a good defence. He who brings mischief on himself by irritating an animal can scarcely hold the owner of it liable.

Vis major.

(b) The escape of an animal from safe custody by the act of God or *vis major* is probably no ground of liability. If the animal escapes from the defendant's own land, his liability for it is simply an application of the rule in *Rylands v. Fletcher*,¹⁷ and must be subject to the exception of the act of God as established by *Nichols v. Marsland*¹⁸; and it is submitted that the same exemption exists in all other cases in which an animal obtains an opportunity of mischief.

Lawful use of highway.

(c) Another exception is the trespass of animals into adjoining land, while being lawfully driven along a highway. There is no liability in this case, except on proof of negligence.¹⁹ The occupiers of land or premises adjoining a highway must guard themselves against the entry of such animals by adequate fencing.

Plaintiff a trespasser.

(d) It is also a good defence that the plaintiff, when injured by the animal, was trespassing upon the defendant's premises where the animal was kept. An occupier, as we have seen, owes no duty of care towards a trespasser in respect of the safety of his premises. A farmer is entitled to keep a bull in his field or a dog in his house, without being liable to a trespasser who enters and is there attacked.²⁰ It is true, indeed, that in *Grange v. Silcock*²¹ the owner of a dog was held liable for the act of his dog in worrying the plaintiff's sheep, although they were trespassing on the defendant's land, but this case turned upon the unqualified provision of the Dogs Act, 1865, that "the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog."²² Even if this

¹⁷ (1868) L.R. 3 H.L. 330. ¹⁸ (1876) 2 Ex.D. 1. *Supra* p. 199.

¹⁹ *Tillett v. Ward* (1882) 10 Q.B.D. 17.

²⁰ *Sarch v. Blackburn* (1830) 4 C. & P. 297; 34 R.R. 805.

²¹ (1897) 77 L.T. 340.

very literal interpretation of the Act as excluding all common law justifications is correct, the same principle is not applicable to cases in which the defendant is sued at common law.

- (e) Finally the maxim *Volenti non fit injuria* must be deemed no less applicable to dangerous animals than to other dangerous things of which the plaintiff has agreed to run the risk. Consent.

11. Although it is usual and convenient to speak of the liability of the owner of an animal, liability does not depend on ownership in this case, any more than in the case of other kinds of dangerous property. It depends on possession; he who keeps an animal is responsible for its acts, whether he is the owner of it or not, and presumably the owner is not responsible unless he is also the possessor. ²³ Who is liable for animals.

12. How long does a person remain responsible for an animal which was once in his possession but has escaped from it? This has never been decided. It may be suggested, however, that his responsibility does not cease until the animal has either been reduced into the possession of some other person, or has recovered, *sine animo revertendi*, that condition of natural liberty from which it was taken. Presumably he who lets a rat out of a trap, or releases a captive fox, is not responsible for its future actions. Duration of liability.

13. In the case of mischief done by dogs to cattle, it is provided by the Dogs Act, 1906, that the *owner* of a dog shall be liable for it. The same Act provides, however, that in the case of such an injury "the occupier of any house or premises where the dog was kept or permitted to live or remain at the time of the injury shall be presumed to be the owner of the dog, and shall be liable for the injury unless he proves that he was not the owner of the dog at that time."²⁴ Who is liable for a dog.

²³ The Dogs Act, 1906, is to the same effect.

²⁴ *McKone v. Wood* (1831) 5 C. & P. 1; 38 R.R. 787.

²⁵ Dogs Act, 1906, s. 1. It is not clear what these provisions really mean. If the occupier of the premises fulfils this burden of proof, who is liable for the dog? Is the owner, as such, liable at all, or does the term owner mean keeper? Is the keeper liable if he is neither the owner of the dog nor the occupier of the premises? Is the occupier of the premises (not being also the owner of the dog) free from liability altogether, even on proof of *scienter*? Is the owner of the dog liable if he is no longer in possession of it, as when it has been stolen?

CHAPTER XIII.

INJURIES TO DOMESTIC RELATIONS.

§ 127.—Parent and Child.

Rights of a
parent as
such.

1. No parent has, as such, any right in respect of his child, of such sort that an action for damages will lie against any other person for a violation of that right.¹ The only right which a parent has as such is a right to the possession and custody of his child during minority. The remedy for the infringement of this right is not an action for damages against the person who deprives him of his child,² but the recovery of possession either by means of a writ of *habeas corpus*, or by an application to the Chancery Division to exercise its power in respect of the guardianship of infants.³

Rights of a
parent as a
master.

2. All rights of action vested in a parent in respect of his child are vested in him, not in his capacity as a parent, but in his capacity as the master of his child, and are therefore dependent upon the existence in the particular case of the relation of master and servant. If this relation does not exist, either because the child is too young to give any services, or because he is in the service of some other person, or for any other reason, the father has no remedy for any wrong done

¹ *Hall v. Hollander* (1825) 4 B. & C. 660 ; 28 R.R. 437.

² *Barham v. Dennis*, Cro. Eliz. 770.

³ It is true, indeed, that an action of trespass would formerly lie at the suit of the father for the taking away of his son and heir, but it was decided in *Barham v. Dennis*, Cro. Eliz. 770, that this remedy did not extend to the taking away of his other children, and that the ground of the action even in the case of the son and heir was the valuable interest which the father had in the marriage of the child under the old system of tenure in chivalry. See Blackstone, III. 140. In *Hall v. Hollander* (1825) 4 B. & C. p. 660, 28 R.R. p. 439, Holroyd, J., says: "It is clear that in cases of taking away a son or daughter, except for taking a son and heir, no action lies unless a loss of service is sustained."

to him in respect of his child. Thus in *Hall v. Hollander*⁴ a father sued for the negligence of the defendant in causing physical harm to his child aged two years and a half, and was held to have no cause of action, because the child was too young to afford any services to him, and therefore the relation of master and servant could not and did not exist between them. Similarly, in the absence of this relation, a father has no right of action for the seduction of his daughter, and this is so even although, by reason of the resulting pregnancy and child-birth, he has necessarily incurred pecuniary loss. "The foundation of the action by a father to recover damages against the wrongdoer for the seduction of his daughter has been uniformly placed from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest."⁵

3. We have already seen that the *liability* of a father for the wrongful acts of his child depends on the same principle. He is responsible for his children, not as being their father, but as being their employer.⁶

§ 128.—Master and Servant: Seduction.

1. It is a tort actionable at the suit of a master to seduce his female servant and thereby to deprive him of her services. The right of a master to the services of his servant is one which the law protects not merely as against the servant himself but also as against third persons, just as a similar protection is extended to the right of a husband to the *consortium et servitium* of his wife. And just as this latter right is violated by adultery, so the master's right is violated by the seduction of a female servant.

2. Seduction is not, however, actionable *per se*, but only when it results in an actual loss of service. To use the technical terms of the older pleading, the cause of action must be

⁴ (1825) 4 B. & C. 660 ; 28 R.R. 437.

⁵ *Grinnell v. Wells* (1844) 7 M. & G. p. 1041 ; 66 R.R. p. 842.

⁶ *Supra*. p. 60. The right of a parent to recover damages for the death of his child has been already considered in the Chapter on Injuries to the Person. *Supra* p. 334.

laid with a *per quod servitium amisit*. The usual cause of this loss of service is pregnancy and child-birth; but this is not essential, for any loss of service is enough, if it results from the seduction in any manner not too remote; e.g., illness due to mental agitation after seduction and desertion.¹ If the child born is not the child of the defendant,² or if the servant seduced leaves the plaintiff's service for some other reason before her pregnancy has caused any loss of service,³ there is no cause of action.

§ 3. Even loss of service is not a cause of action if the seduction happened before the relation of master and servant came into existence; for the act of the defendant was not in that case the violation of any existing right vested in the plaintiff.⁴

Measure of
damages.

4. The damages in this action are not necessarily limited to the value of the services lost. They include all expenses necessarily or properly incurred by the master in respect of his servant's illness and the birth of her child. And when the relation between the master and servant is such that her seduction is an injury to his honour and feelings, and not merely to his purse, vindictive damages are rightly given: as, for example, when the master is also the father or mother of the person seduced, or some one standing *in loco parentis*, such as an adoptive parent or a relative with whom she lives.⁵ In all such cases, indeed, the action, though in form and in law based on the loss of service, is in substance and in fact based on the injury to the honour and feelings of the parent or other relative of the person seduced. The loss of service is simply the necessary condition which must exist before any claim for such *solatium* can be entertained. It is greatly to be desired, therefore, that the law should be put on a more rational basis, and that the real cause of action should receive legal recog-

¹ *Manvell v. Thomson* (1826) 2 C. & P. 303; 31 R.R. 666.

² *Eager v. Grimwood* (1847) 1 Ex. 61; 74 R.R. 584.

³ *Hedges v. Tagg* (1872) L.R. 7 Ex. 283.

⁴ *Davies v. Williams* (1847) 10 Q.B. 725, 74 R.R. 491; *Hamilton v. Long* (1903) 2 I.R. 407, (1905) 2 I.R. 552.

⁵ *Irwin v. Dearman* (1809) 11 East 23; 10 R.R. 423.

dition, instead of being made available by means of a device which is little better than a legal fiction.⁶

5. It is not necessary that the defendant should have had any knowledge that the person seduced was the servant of the plaintiff.

6. For the purpose of an action for seduction, service is of ^{Kinds of service.} three kinds, any one of which is sufficient : viz., (a) contractual service, (b) *de facto* service, and (c) *constructive* service.

7. Contractual service is that which is rendered under a ^{Contractual service.} binding contract for wages or other valuable consideration and either for a fixed term or at will. This is the ordinary case of master and servant, and may, though it seldom does, exist also between a parent or other person *in loco parentis* and a daughter.

8. *De facto* service is service rendered in fact, but not ^{*De facto* service.} under any binding contract of service. This is the ordinary relation which exists between a father or other person *in loco parentis* and a daughter who resides with him. If service is in fact habitually rendered by a daughter to her parent, there exists between them a sufficient *de facto* relation of master and servant to found an action for loss of service by seduction ; and it makes no difference that the service so rendered may be quite trivial in value or nature. The slightest habitual participation in domestic affairs is sufficient for this purpose. " Even making tea has been said to be an act of service." ⁷ " The smallest degree of service will do." ⁸ " In actions of this sort the slightest evidence is sufficient." ⁹ ¹⁰

⁶ Most actions for seduction are brought by parents or other persons *in loco parentis*. See *Irwin v. Dearman* (1809) 11 East 23, 10 R.R. 423 (adoptive father) ; *Howard v. Crowther* (1841) 8 M. & W. 601 ; 58 R.R. 823 (brother) ; *Manvell v. Thomson* (1826) 2 C. & P. 303, 31 R.R. 666 (uncle) ; *Edmundson v. Machell* (1787) 2 T.R. 4 (aunt). The action, however, lies equally at the suit of an ordinary master. *Fores v. Wilson* (1791) 1 Peake 77 ; 3 R.R. 652.

⁷ *Carr v. Clarke* (1818) 2 Chit. 260 ; 23 R.R. 748.

⁸ *Manvell v. Thomson* (1826) 2 C. & P. 304 ; 31 R.R. p. 668.

⁹ *Bennett v. Allcott* (1787) 2 T.R. 168 ; 31 R.R. 667 note.

¹⁰ The relation of *de facto* service is not excluded or terminated by temporary absence, if the *animus revertendi* still exists. *Griffiths v. Teetgen* (1864) 15 C.B. 344. When a daughter lives with her father and mother and renders domestic service in the ordinary way, this *de facto*

Constructive service.

9. Constructive service is that which exists in the eye of the law, when there is a legal right to service, though none in fact. Thus a father is deemed for this purpose to have a legal right to the services of his children who are minors, unmarried (if daughters), and not engaged by contract to serve some other person exclusively. This right of service amounts to constructive service, and is therefore sufficient to ground an action for seduction or for any other violation of the rights of a master, provided that the two following conditions are fulfilled :—

- (a) The child must be old enough to be capable of performing acts of service ;¹¹
- (b) The child must be either resident in the father's house, or must be merely temporarily absent from it with the *animus revertendi*.

If these two conditions are fulfilled, it is not necessary in an action for seduction or other violation of a master's rights to prove any actual service, whether contractual or *de facto*, for the law will conclusively presume that service exists. Thus in *Terry v. Hutchinson*¹² the plaintiff's daughter under the age of twenty one, being in the domestic service of another person, left that service with the intention of returning to her father's house, and in the course of her homeward journey was seduced by the defendant ; and it was held that her father had a good cause of action. Cockburn, C.J., says :¹³ " I think there was enough to amount to a constructive service. . . . What is the difference, if the father had the right to the service, that he has not actually exercised that right." So also in *Maunder v. Venn*¹⁴ it is said : " Proof of any acts of service was unnecessary ; it was sufficient that she was living with

service is with the father exclusively, and not with the mother, and the mother has no cause of action. *Hamilton v. Long* (1903) 2 I.R. 407 ; (1905) 2 I.R. 552.

¹¹ *Hall v. Hollander* (1825) 4 B. & C. 660 ; 28 R.R. 437.

¹² (1868) L.R. 3 Q.B. 599.

¹³ At p. 601. So Mellor, J., at p. 603 : " It is clear that when a father has a right to the service of the child, the action can be maintained without any proof of actual service."

¹⁴ (1829) Mood. & M. p. 323 ; 31 R.R. 734.

her father, forming part of his family, and liable to his control and command. The right to the service is sufficient."¹⁵

If, however, the daughter is of full age, there is no constructive service, and the father must prove either *de facto* or contractual service. And even in the case of minors constructive service is excluded by permanent absence from the father's house with no *animus revertendi*.¹⁶

10. A servant may at the same time be in the service of two different masters, and in this case each of them will have a right of action for her seduction. In *Thompson v. Ross*¹⁷ Concurrent service with two masters. Bramwell, B., says: "I do not think it impossible that there may be two masters of one servant; a person may have a form of contract that in the daytime he or she should render such and such services to one person, and another contract that after the day is over other services shall be rendered to some other person." Accordingly in *Ogden v. Lancashire*¹⁸ a father was held entitled to sue for the seduction of his daughter who lived with him and rendered him *de facto* service, notwithstanding the fact that she was engaged during the working hours of each day in the contractual service of a mill-owner. A similar decision was given by the Exchequer Chamber in *Rist v. Faux*¹⁹ in the case of a daughter who worked all day as an agricultural labourer, but resided with her father and was in his *de facto* service. It is to be presumed that in the case of children under age constructive service is on the same principle sufficient, although concurrent with contractual service to a third person during working hours.

When, on the other hand, the daughter habitually resides, not with her father, but with her employer, to whom she owes exclusive contractual service, no *de facto* or constructive service to her father is sufficient to give him any cause of action. Thus in *Whitbourne v. Williams*²⁰ a father was held to have no cause of action, although his daughter, who was a domestic servant, returned to her home on her weekly half-

¹⁵ See also *Jones v. Brown* 1 Peake 306, 7 R.R. 656 n., in which constructive service was held sufficient to found an action by a father for an assault upon his son under age.

¹⁶ *Dean v. Peel* (1804) 5 East 45; 7 R.R. 653.

¹⁷ (1860) 29 L.J. Ex. p. 3.

¹⁸ (1866) 15 W.R. 158.

¹⁹ (1863) 4 B. & S. 409.

²⁰ (1901) 2 K.B. 722.

holidays and there and then performed acts of household service. So in *Hedges v. Tagg*²¹ a daughter engaged as a governess came back to her mother's house for a holiday of three days, and did acts of domestic service ; and although she was seduced while thus at home, her mother was held to have no cause of action. The concurrent contractual service with her employer was inconsistent with and excluded the *de facto* service with her mother. In these cases it makes no difference whether the parent's claim is based on *de facto* or merely on constructive service.²²

§ 129.—Master and Servant: Other Injuries.

Other injuries to a master.

1. It is a tort actionable at the suit of a master to take away, imprison, or cause physical harm to his servant, if (a) the act is a tort as against the servant, and (b) the master is thereby deprived of his servant's services.¹

2. For the purpose of this rule the relation of master and servant is governed by the same principles as those already explained in the case of seduction. The service may be either contractual, *de facto*, or constructive ; and the plaintiff may be either an employer in the ordinary sense, or a parent or other person *in loco parentis* suing in respect of services (however trivial) which he receives or is entitled to receive from a child.

Thus in *Gilbert v. Schwenck*² a mother, who was a testamentary guardian of her two children, sued a joint testamentary guardian for taking them by force from her custody *per quod servitium amisit*. So in *Jones v. Brown*³ a father sued for the loss of the constructive services of his son, who had been assaulted by the defendant. So in *Berringer v. Great Eastern Railway Company*⁴ a father recovered damages from a railway

²¹ (1872) L.R. 7 Ex. 283.

²² See *Carr v. Clark* (1818) 2 Chit. 260, 23 R.R. 748 ; *Blaymire v. Haley* (1840) 6 M. & W. 55, 55 R.R. 501 ; *Thompson v. Ross* (1860) 5 H. & N. 16.

¹ *Martinez v. Gerber* (1841) 3 M. & G. 88, 60 R.R. 466 ; *Berringer v. Gt. E. Rly. Co.* (1879) 4 C.P.D. 163 ; *Gilbert v. Schwenck* (1845) 14 M. & W. 488, 69 R.R. 745 ; *Hall v. Hollander* (1825) 4 B. & C. 660, 28 R.R. 437 ; *Osborn v. Gillett* (1873) L.R. 8 Ex. 88 ; *Jones v. Brown* (1794) 1 Peake 306, 7 R.R. 656, n.

² (1845) 14 M. & W. 488 ; 69 R.R. 745.

³ (1794) 1 Peake 306 ; 7 R.R. 656 n. ⁴ (1879) 4 C.P.D. 163.

company for physical harm done to his son, who was in his *de facto* service.⁵

3. In the absence of lawful justification it is a tort action- Inducing
able at the suit of a master to induce his servant to leave his servant to
employment wrongfully, or to induce him by illegal means, leave his
such as fraud or intimidation, to leave his employment even employment.
rightfully.⁶

4. For the purpose of this rule the relation of master and servant is governed by the rules already explained in the case of seduction. So that it is actionable under this rule to induce a child under age but capable of service to leave his father against the latter's will, unless there is some lawful justification.^{7 8 9}

5. When no illegal means of inducement or coercion are used by the defendant, it is not a tort to induce a servant to leave his master's service, unless the act of the servant in doing so is wrongful. Therefore to persuade a servant to leave a merely *de facto* service or to terminate a contractual service by due notice is not actionable.^{10 11}

⁵ The fact that the wrong done to the servant is not merely a tort but also a breach of a contract made with him, does not exclude or in any way affect the master's right of action for loss of service. The decision to the contrary in *Alton v. Midland Rly. Co.* (1865) 19 C.B. N.S. 213, must now be disregarded, either as bad law, or as turning merely upon a point of pleading. See *Meux v. Gt. E. Rly. Co.* (1895) 2 Q.B. 387 at pp. 391, 394.

⁶ *Lumley v. Gye* (1853) 2 E. & B. 216; *Bowen v. Hall* (1881) 6 Q.B.D. 333.

⁷ *Evans v. Walton* (1867) L.R. 2 C.P. 615.

⁸ In the case of *Speight v. Oliviera* (1819) 2 Stark. 493, 20 R.R. 728, it was held that to induce a daughter of full age to leave her father's house by means of a fraudulent pretence of engaging her as a domestic servant, the real intention being to seduce her, was a tort actionable at the suit of her father. This must be taken as an application of the present rule, and not of that as to seduction.

⁹ In more than one case the act of engaging a servant who is known to have left his master wrongfully, or of continuing to employ such a servant after knowledge of the facts, has been held actionable at the suit of the former master. *Blake v. Lanyon* (1795) 6 T.R. 221, 3 R.R. 162. It is submitted, however, that if these decisions are still law, their authority must be confined to cases in which it is proved that the defendant did in fact induce or procure the servant to remain away from his master.

¹⁰ *De Francesco v. Barnum* (1890) 45 Ch.D. 430. This limitation

§ 180.—Husband and Wife.

Injuries to
a husband.

1. It is a tort actionable at the suit of a husband to take away, imprison, or do physical harm to his wife, if (a) the act is wrongful as against the wife, and (b) the husband is thereby deprived of her society or services. A husband has a right as against third persons to the *consortium et servitium* of his wife, just as a master has a similar right to the *servitium* of his servant. Any tortious act, therefore, committed against the wife is actionable at the suit of her husband, if he can prove that he was thereby deprived for any period of her society or services (*per quod consortium et servitium amisit*).¹

2. The two causes of action thus vested in a wife and her husband respectively are concurrent and cumulative. Thus if a married woman suffers physical harm in a railway accident, the company is liable in two actions, one at the suit of the wife, alone or jointly with her husband, for the damage so sustained by herself, and another at the suit of the husband alone for the injury done to him. These two actions may be brought separately or together.²

3. If the wife is not merely injured but killed, the husband's claim for loss of *consortium et servitium* is limited to the interval between her injury and her death³; but he may have a statutory claim to compensation for her death under the Fatal Accidents Act.⁴

4. When there is no loss of *consortium et servitium* the husband has no action, as when he was at the time of the act complained of permanently separated from his wife.⁵

must be taken to be implied in the judgments in *Evans v. Walton* (1867) L.R. 2 C.P. 615, although it is not expressed.

¹¹ For a further consideration of the law as to inducing servants to leave their masters' employment, see the chapters on Intimidation and on Residuary Forms of Injury.

¹ Blackstone III. 139; *Baker v. Bolton* (1808) 1 Camp. 493. 10 R.R. 734; *Brockbank v. Whitehaven Rly. Co.* (1862) 7 H. & N. 834.

² *Brockbank v. Whitehaven Rly. Co.* (1862) 7 H. & N. 834.

³ *Baker v. Bolton* (1808) 1 Camp. 493; 10 R.R. 734.

⁴ *Supra*. p. 334.

⁵ See *Weedon v. Timbrell* (1793) 5 T.R. 357; *Izard v. Izard* (1889) 14 P.D. 45.

5. In the absence of lawful justification, it is a tort action-Inducing a wife to leave her husband.
able at the suit of the husband to induce his wife to leave him or to remain away from him against his will.⁶ A husband has no longer, indeed, any right or power, whether by way of judicial proceedings or otherwise, of compelling his wife to live with him.⁷ Nevertheless it is to be assumed that he still retains his right of action against any third person who induces her to refuse to do so without sufficient cause. It is, however, a sufficient justification for such inducement, that owing to the husband's conduct the wife is justified, or is (it would seem) honestly believed by the defendant to be justified in leaving her husband.⁸ Whether there is any other lawful justification for such an interference between husband and wife does not appear from the authorities.

6. To commit adultery with a married woman is a tort Adultery.
against her husband, but he can recover damages for it only by petition in the Probate Divorce and Admiralty Division of the High Court of Justice, and not in an ordinary action. Adultery was formerly a tort actionable by writ of trespass, the action being known as that of criminal conversation.⁹ This action has been abolished by the Divorce and Matrimonial Causes Act, which has substituted for it a petition in the Divorce Court, either with or without a petition for divorce.¹⁰ A husband's claim for damages in such a petition is governed by the same principles which formerly regulated the action of criminal conversation, subject to such modifications as are expressly or impliedly effected by the Act in question; *e.g.*, as to the effect of condonation.¹¹

7. It is uncertain whether a married woman has any right Injuries to a wife.
in respect of her husband, of such sort that an action for damages will lie against any other person for the violation of

⁶ *Winsmore v. Greenbank* (1745) Willes 577; *Philp v. Squire* (1791) 1 Peake 114; 3 R.R. 659; *Berthon v. Cartwright* (1796) 2 Esp. 480; *Smith v. Kaye* (1904) 20 T.L.R. 261.

⁷ *Reg. v. Jackson* (1891) 1 Q.B. 671.

⁸ *Berthon v. Cartwright* (1796) 2 Esp. 480; *Philp v. Squire* (1791) 1 Peake 114, 3 R.R. 659.

⁹ *Weedon v. Timbrell* (1793) 5 T.R. 357.

¹⁰ 20 & 21 Vict. c. 85, ss. 33, 59.

¹¹ *Cox v. Cox* (1906) P. 267.

it. There is no precedent for any action by a wife for the loss of the society or support of her husband by reason of any wrongful act committed against the husband, for example false imprisonment or wrongful physical harm, and it may be assumed that no such action would lie, the remedy available by the husband himself being sufficient to meet the case.¹²

Nor will any action lie at the suit of a wife for adultery committed with her husband.¹³ But there would seem to be no reason why the act of wrongfully inducing a husband to desert or to cease to maintain his wife should not be actionable at the suit of the wife. This would be nothing more than an application of the general principle, that he who procures the commission of a wrongful act is liable for its consequences. Moreover there is some authority for saying that where a tort committed against a wife produces, as its intended or natural result, a loss of the *consortium* of her husband, this is to be taken into account in estimating damages: for example a slander published against a wife with the result that her husband refuses to live with her.¹⁴ For the death of her husband a wife may claim compensation under the Fatal Accidents Act.¹⁵

¹² Blackstone, III. 143. ¹³ *Lynch v. Knight* (1861) 9 H.L.C. p. 589.

¹⁴ *Lynch v. Knight* (1861) 9 H.L.C. p. 589 *per* Lord Campbell p. 595, *per* Lord Cranworth. *Contra*, p. 957, *per* Lord Wensleydale.

¹⁵ *Supra*, p. 335.

CHAPTER XIV.

DEFAMATION.

§ 131.—Defamation Defined. Libel and Slander.

1. The wrong of defamation consists in the publication of Defamation a false and defamatory statement respecting another person ^{defined.} without lawful justification.

2. A defamatory statement is not necessarily made in words, either written or spoken. A man may defame another by his acts, no less than by his words. To exhibit an insulting picture holding up the plaintiff to ridicule or contempt is an actionable libel.¹ So also is the act of placing an effigy of the plaintiff among those of murderers and other ill-famed persons in an exhibition.²

3. The wrong of defamation is of two kinds, namely, libel Libel and and slander. In libel the defamatory statement is made in ^{slander.} some permanent and visible form, such as writing, printing, pictures, or effigies. In slander it is made in spoken words or in some other transitory form, whether visible or audible, such as gestures, hissing, or other inarticulate but significant sounds.³ Libel and slander are for the most part governed by the same principles; and except where the contrary is stated, the observations in this chapter are to be taken as applicable to both these forms of defamation equally. There are, however, two important differences:

- (a) Libel is not merely an actionable tort, but also a criminal offence; whereas slander is a civil injury only.
- (b) Libel is in all cases actionable *per se*, but slander is, save in special cases, actionable only on proof of actual

¹ *Du Bost v. Beresford* (1810) 2 Camp. 511; 11 R.R. 782.

² *Monson v. Tussaud's Ltd.* (1894) 1 Q.B. 671.

³ *Monson v. Tussaud's Ltd.* (1894) 1 Q.B. p. 692, *per* Lopes, L.J.

damage. We shall consider later what these cases are, and what forms of actual damage are a sufficient cause of action.

§ 132.—The Defamatory Nature of a Statement.

Defamatory statements.

1. A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers ; which tends, that is to say, to diminish the good opinion that other persons have of him, and to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem.¹

Distin-
guished from
injurious
statements.

2. A defamatory statement must be distinguished from one which is merely injurious. Both are falsehoods told by one man to the prejudice of another, and both are on certain conditions actionable ; but they are to a large extent governed by different rules. An injurious statement is a falsehood told about another, which in no way affects his reputation, but nevertheless in some other manner causes loss to him. Thus it is not defamatory to state in a newspaper that a certain tradesman has ceased to carry on business ; yet if this statement is wilfully false, and causes him actual damage, an action will lie for it.³ But to state falsely that he carries on business incompetently or dishonestly is defamatory, and an action will lie even though the statement is not wilfully false, and even though actual damage has not been caused by it. Similarly, to say falsely of a shopkeeper that his goods are of a quality inferior to those of another trader is not the wrong of defamation, but that of injurious falsehood ; but to say of him that he fraudulently sells inferior goods as of superior quality is an attack, not merely upon his business, but upon his reputation, and is therefore defamatory.⁴ The law of injurious falsehood, as distinguished from that of defamation, will be considered by us in a later chapter.⁵

¹ *Parmiter v. Coupland* (1840) 6 M. & W. p. 108, 55 R.R. p. 532 ; *Capital & Counties Bank v. Henty* (1882) 7 A.C. p. 771 ; *South Hetton Coal Co. v. N.E. News Association* (1894) 1 Q.B. p. 138.

³ *Ratcliffe v. Evans* (1892) 2 Q.B. 524.

⁴ See *Linotype Co. v. British Empire Type-setting Machines Co.* (1889) 81 L.T. 331 ; *South Hetton Coal Co. v. N.E. News Association* (1894) 1 Q.B. p. 139.

⁵ Ch. XV. *infra*.

3. Mere insult, it would seem, does not amount to defam- Insult.
ation. Defamation is a false statement or suggestion of fact to the prejudice of a man's reputation; insult consists in words or conduct offensive to a man's dignity, but involving no false statement or suggestion. Insult in itself seems to be no cause of action by the law of England, though particular forms of insult are actionable because accompanied by other facts which confer a right of action. Assault, false imprisonment, and certain kinds of wilful and wanton trespasses to property amount to insults, as being attacks upon the dignity of the plaintiff as well as upon his person or property; and vindictive damages may accordingly be obtained for them. Insulting threats, not amounting to assault, are apparently not actionable at all.

4. The test of the defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinions or feelings of other persons. The typical form of defamation is an attack upon the moral character of the plaintiff, attributing to him any form of disgraceful conduct, such as crime, dishonesty, untruthfulness, ingratitude, or cruelty.⁶ A statement, however, is defamatory if it tends to bring the plaintiff into ridicule, even though there is no suggestion of any form of misconduct.⁷ An action will lie, therefore, for the publication of a humorous story which exhibits the plaintiff in a ridiculous light, or for a caricature of his personal appearance or manners. Kinds of defamatory statement.

5. A statement is defamatory, if it amounts to a reflection upon the fitness or capacity of the plaintiff in his profession or trade, or in any other undertaking assumed by him. For a man is brought into contempt or disesteem, if he is charged with professing to do work for which he is unqualified. Therefore it is actionable to say of a solicitor that he is ignorant of law, or to say of a physician that he has illtreated a patient, or of an artisan that he does bad work.⁸ Incapacity.

⁶ *Cox v. Lee* (1869) L.R. 4 Ex. 284; *Clement v. Chivis* (1829) 9 B. & C. 172, 32 R.R. 624.

⁷ *Cook v. Ward* (1830) 6 Bing. 409, 31 R.R. 456; *Cropp v. Tilney* 3 Salk. 225.

⁸ *Capital & Counties Bank v. Henty* (1882) 7 A.C. p. 771; *Henwood v. Harrison* (1872) L.R. 7 C.P. 606; *Sadgrove v. Hall* (1901) 2 K.B. 1.

Insanity.

6. A statement is defamatory if it attributes insanity to the plaintiff.⁹ It is true that insanity is a misfortune and not a fault; but it is no less true that it is one of those misfortunes which destroy a man's reputation.

Insolvency.

7. A statement is defamatory if it imputes insolvency to a trader; and this is so, whether or not the statement includes any suggestion of discreditable conduct or incapacity.¹⁰ It may be doubted, indeed, whether this is strictly logical. It would seem that, apart from any such suggestion, an allegation of insolvency should be classed merely as an injurious falsehood, not as defamation. For insolvency is not a personal quality or defect like insanity, which in itself excites the disrespect or dislike or ridicule of other persons. It is a misfortune which is consistent with a high regard for the character and competence of the insolvent. Nevertheless it is settled law that a charge of insolvency is to be classed as defamatory and is subject to all the severities of the law of libel, and not to the more lenient rules which govern cases of injurious falsehood. In view of the very serious mischief which an unfounded allegation of insolvency may work, it is well that responsibility for it should be maintained at this high level.

Adverse
opinions of
a particular
class of
persons.

8 A statement is not defamatory, merely because it excites hatred, contempt, ridicule, or other adverse feelings in some particular class of the community whose standard of opinion is such that the law cannot approve of it or notice it. Thus in the Irish case of *Mawe v. Pigott*¹¹ the plaintiff, an Irish priest, sued for words charging him with being an informer against certain classes of Irish criminals; and it was held that he had no cause of action, notwithstanding the fact that such informers were held in hatred and bad repute by a certain section of the community which sympathised with the forms of crime in question. "We cannot," said the court,¹² "be called upon to adopt that standard. . . . We can only regard the estimation in which a man is held by society generally."¹³

⁹ *Morgan v. Ligan* (1863) 8 L.T. (N.S.) 800; *Hodson v. Pare* (1899) 1 Q.B. 455.

¹⁰ *Read v. Hudson* (1700) 1 Lord Raym. 610; *Shepherd v. Whittaker* (1875) L.R. 10 C.P. 502.

¹¹ (1869) Ir. Rep. 4 C.L. 54.

¹² At p. 62.

¹³ See also *Clay v. Roberts* (1863) 8 L.T. (N.S.) 397; *Miller v. David* (1874) L.R. 9 C.P. 118.

§ 133.—Defamation of a Corporation.

1. A statement is defamatory of a corporation, and is actionable as such at the suit of the corporation, if both of the two following conditions exist, but not otherwise: (a) the statement must be of such a nature that it would have been defamatory, had it been directed against an individual; (b) it must also be of such a nature that its tendency is to cause actual damage to the corporation in respect of its property or business.

2. An incorporated company or other body corporate has in truth no reputation to be injured. It is a fictitious person and cannot in the nature of things be brought into hatred ridicule or contempt by any manner of falsehood. The reputation that is in reality assailed by a charge made against a corporation is the reputation of the members or other agents by whom the affairs of the corporation are conducted. Yet by attacking in this manner the reputation of its members and agents, damage may be caused to the corporation itself in respect of its business and property. For any defamatory statement, therefore, which produces such actual damage, the corporation may sue. Nor is it necessary to prove that such damage has actually accrued; it is sufficient if the defamatory statement is of such a kind that its tendency is to cause harm of this nature.

3. Thus an action of libel will lie at the suit of a trading corporation charged with insolvency or with dishonest or incompetent management.¹ Similarly a coal mining company may sue on a charge of failing to supply decent and sanitary accommodation for its workmen and their families; for such an accusation tends to injure it in its business.² On the same principle even a non-trading corporation, such as a municipal body, may presumably sue for a libel tending to its pecuniary damage.

But where there is no actual damage nor any tendency to produce such damage, no action will lie at the suit of the corporation; the only persons who have any cause of action are the individual members or agents of the corporation who have

¹ *Metropolitan Saloon Omnibus Co. v. Hawkins* (1859) 4 H. & N. 587.

² *South Hetton Coal Co. v. N.E. News Association* (1884) 1 Q.B. 133.

been defamed. Thus in *Mayor of Manchester v. Williams*³ it was held that a municipal corporation could not sue for a libel charging it with corruption and bribery in the administration of municipal affairs.

§ 134.—Interpretation of Defamatory Statements.

The meaning
of defama-
tory state-
ments. ,

1. In determining whether a statement is defamatory or not, the meaning to be attributed to it is not necessarily the meaning with which the defendant published it, but that which is or may be presumed to be, reasonably given to it by the persons to whom it is published. The statement means in law what it naturally and reasonably means for them. "The test is whether under the circumstances in which the writing was published reasonable men to whom the publication was made would be likely to understand it in a libellous sense."⁴ "It does not signify what the motive of the person publishing the libel was, or whether he intended it to have a libellous meaning or not."⁵ A defamatory purpose will not make him liable, if the statement has for other persons no libellous significance⁶; and conversely an innocent intention will be no defence for a person who makes a statement which has a defamatory meaning for those to whom he makes it. He is, however, not responsible for a defamatory signification not intended by him, but attributed by others to his words, unless these words are reasonably and naturally susceptible to the interpretation put upon them. For perverse misconstruction he is not accountable.

Statements
not known
to be
defamatory.

2. Is a person responsible, then, for a statement which he believes to be innocent, but which is in fact defamatory by reason of facts unknown to him but known to the persons to whom he makes it? It would seem that such ignorance of the defamatory nature of a statement is no defence, and that he who knowingly makes any statement concerning another must take the risk of that statement being in fact defamatory.

³ (1891) 1 Q.B. 94.

⁴ *Capital & Counties Bank v. Henty* (1882) 7 A.C. at p. 745. See also p. 772.

⁵ *Nevill v. Fine Arts Insurance Co.* (1895) 2 Q.B. p. 168. See also *Hankinson v. Bilby* (1847) 16 M. & W. 442, 73 R.R. 563.

⁶ *Sadgrove v. Hole* (1901) 2 K.B. 1.

Thus in the Scottish case of *Morrison v. Ritchie*⁴ a newspaper was held liable for publishing in good faith, without negligence and in the ordinary way of business, a mistaken announcement that the plaintiff had given birth to a child, the fact being that the lady had been only two months married. The question, however, seems never to have been considered in an English Court.

3. The interpretation of a defamatory statement is a question of fact for a jury⁵. The right of the jury in this matter is subject, however, to two limitations. The first of these is that the judge must first be satisfied that there is sufficient evidence to go to the jury. That is to say, he must be satisfied that the statement is reasonably capable of the meaning which the plaintiff alleges and complains of; and if he considers that it is not so capable, the case must be withdrawn from the jury altogether.

Thus in *Capital & Counties Bank v. Henty*⁶ the defendants, having had a dispute with one of the branch managers of the plaintiffs' bank, sent a circular notice to their own customers in the words: "Henty and Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." An action for libel was thereupon brought by the Bank, alleging that the notice was defamatory, inasmuch as it amounted to an imputation of insolvency. It was held, however, by the House of Lords that the statement was not reasonably capable of such a meaning, and that there was no case fit to be left to a jury.

Similarly in *Nevill v. Fine Art & General Insurance Co.*⁷ the defendant company sent to their clients a circular to the effect that "the agency of Lord William Nevill has been closed by the directors"; and an action of libel was brought on the ground that this statement was defamatory as imputing some dishonest or discreditable conduct to the plaintiff. The House of Lords determined that the words were not capable of any such meaning. "The words," said Lord Halsbury,⁸

⁴ (1902) 4 F. 645 Ct. of Sess.

⁵ *Capital & Counties Bank v. Henty* (1882) 7 A.C. p. 775.

⁶ (1882) 7 A.C. 741.

⁷ (1897) A.C. 68.

⁸ At p. 76.

"must be susceptible of a libellous meaning in this sense, that a reasonable man could construe them unfavourably in such a sense as to make some imputation upon the person complaining."

4. The second qualification of the general rule that the question of libel or no libel is a question of fact for the jury, is that it is a question of law for the judge whether the meaning attributed to the statement is in law a defamatory meaning. The rules of law on this point have already been considered by us.⁹ Whether, for example, the words complained of do in truth impute insolvency or insanity to the plaintiff is a question of fact for the jury; whether an imputation of insolvency or insanity is defamatory is a question of law for the judge.

§ 135.—The Innuendo.

Innuendo.

1. No statement is necessarily and in all circumstances defamatory. There is no charge or imputation, however serious on the face of it, which may not be explained away by evidence that in the special circumstances of the case it was not issued or understood in a defamatory sense. It may be shown to have been made in jest, or by way of irony, or in some metaphorical or secondary innocent sense, and that it was or ought to have been understood in that sense by those to whom it was made. Conversely no statement is necessarily and in all circumstances innocent. An allegation which on the face of it contains no imputation whatever against the plaintiff may be proved from the circumstances to have contained a latent and secondary defamatory sense. It may suggest an imputation which it does not express. Thus even the language of praise may be sued on as defamatory, on proof that it was used in the way of irony.¹

2. Although no statements are necessarily defamatory or necessarily innocent, yet all statements are divisible into two classes, according as they are (1) *prima facie* and on the face of them defamatory, or (2) *prima facie* and on the face of them innocent. A statement is *prima facie* defamatory, when its natural, obvious, and primary sense is defamatory; such a

⁹ *Supra*, p. 382.

¹ *Boydell v. Jones* (1838) 4 M. & W. 446; 51 R.R. 676.

statement is actionable unless its defamatory significance is successfully explained away ; and the burden of such an explanation rests upon the defendant. A statement *prima facie* innocent, on the other hand, is not actionable, unless its latent or secondary defamatory meaning is sufficiently proved by the plaintiff.

3. When a statement is *prima facie* innocent, the plaintiff must expressly and explicitly set forth in his pleadings the defamatory sense which he attributes to it.² Such an explanatory statement is called an *innuendo*. The plaintiff is bound by his own *innuendo*, and must prove the meaning as so alleged by him. He cannot at the trial fall back upon some other secondary and latent sense, instead of that which he himself alleged in his pleadings.³

4. When a statement is *prima facie* defamatory, an *innuendo* is not necessary but is nevertheless admissible. Its use in such a case is to allege a further defamatory significance lying latent in a statement which is itself defamatory in some other respect on the face of it. In such a case it is not necessary to prove the *innuendo* as laid, because, even if the plaintiff fails to prove this, he can fall back upon the primary defamatory sense of the statement.⁴

§ 136.—Proof of Reference to the Plaintiff.

1. It is essential in every action for defamation that the defamatory statement should be shown to refer to the plaintiff. Reference to plaintiff. It is never necessary, however, that this reference should be express. It may be latent ; and it is sufficient in such a case that it should have been understood even by one person, although it remained hid from all others. " Whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very

² *Cox v. Cooper* (1863) 12 W.R. 75 ; *Jacobs v. Schmaltz* (1890) 62 L.T. 121.

³ *Simmons v. Mitchell* (1880) 6 A.C. 156.

⁴ *Watkin v. Hall* (1868) L.R. 3 Q.B. p. 402 *per* Blackburn, J. ; *Fisher v. Nation Newspaper* (1901) 2 Ir. R. 465.

same thing is in fact done, as would be done if his name and Christian name were ten times repeated.”¹

Thus in *Le Fanu v. Malcolmson*² the defendants published in a newspaper a statement that in some of the Irish factories cruelties were practised upon the work-people; and they were held liable on a finding by the jury that the statement was understood to refer specially to the plaintiff's factory.

Defamation
of classes
of persons.

2. It is not essential that the defamatory imputation should be directed either expressly or impliedly against the plaintiff exclusively and individually. An accusation against a whole class of persons may be actionable at the suit of each of them. Thus it is actionable to libel a firm of partners, or the members of a jury, or the servants of a particular employer. In such cases of general accusation, however, the class must not be so large that the statement ceases to be in reality defamatory of any particular individual belonging to it. No action would lie at the suit of anyone for saying that all mankind is vicious and depraved, or even for alleging that all clergymen are hypocrites, or all lawyers dishonest.³ For charges so general in their nature are not to be taken literally by reasonable men, but must be considered subject to such exceptions that no particular individual can reasonably be considered to be attacked or to have his reputation injured.

3. Similarly an imputation may be defamatory and actionable at the suit of the plaintiff if it is made against some unspecified members of a class to which he belongs, even though it is impossible to show that the defendant meant or was understood to mean the plaintiff individually. Thus if the defendant says in writing that his horse has been stolen either by A or B, he knows not which, then both A and B will have an action against him, for both are thereby brought under suspicion and defamed.⁴ But here also the class must not be so large that the charge ceases to affect the reputation of any individual member of it.

¹ *Le Fanu v. Malcolmson* (1848) 1 H.L.C. p. 668.

² (1848) 1 H.L.C. 637.

³ *Eastwood v. Holmes* (1858) 1 F. & F. 347.

⁴ *Harrison v. Thornborough* 10 Mod. 196. A verbal statement to this effect, however, would presumably fall within the rule that in the case of the imputation of a criminal offence words of mere suspicion are not actionable. See *infra*, p. 415.

§ 137.—Publication.

1. The publication of a defamatory statement means the **Publication defined.** act of making it known to any person or persons other than the plaintiff himself. It is not necessary that there should be any publication in the popular sense of making the statement public. A private and confidential communication to a single individual is sufficient. A communication to the person defamed himself, however, is not a sufficient publication on which to found civil proceedings¹; though it is otherwise in the case of a criminal prosecution.² Nor does a communication between husband and wife amount to publication; domestic intercourse of this kind is exempted from the restrictions of the law of libel and slander.³ But a statement by the defendant to the wife or husband of the plaintiff is a ground of action.⁴

2. The contents of a written document may be published **Modes of publication.** either by allowing some one to read the document for himself or by reading it out to him. It is submitted, however, that this latter mode of communication amounts to slander only, and not to libel. A defamatory statement may be published by being dictated to a clerk, shorthand writer, or other reporter who reduces it to writing, but it is submitted in this case also that such a publication amounts to slander only. There are *dicta* to the contrary, indeed, in certain cases in which dictation to a clerk is said to be the publication of a libel to the clerk; but it is difficult to see how A can publish to B a document which is written by B himself.⁵

3. Every man is responsible for the publication of a defamatory statement by another with his authority, and for this reason a speaker who knows that his words are being reported for the public press, and who expressly or impliedly sanctions such a publication, can be sued for libel, and not merely for slander.⁶

¹ *Pullman v. Hill* (1891) 1 Q.B. p. 527.

² *R. v. Adams* (1888) 22 Q.B.D. 66.

³ *Wennhak v. Morgan* (1888) 20 Q.B.D. 635.

⁴ *Wenman v. Ash* (1853) 13 C.B. 836.

⁵ *Pullman v. Hill* (1891) 1 Q.B. at pp. 527, 529. *Boxsius v. Goblet Freres* (1894) 1 Q.B. at p. 844. See Odgers on Libel p. 154, 4th ed.

⁶ *Parke v. Prescott* (1869) L.R. 4 Ex. 169.

4. A publication is not sufficient, unless it is made to a person who understands the defamatory significance of the statement, and who also understands that it refers to the plaintiff. Thus in *Sadgrove v. Hole*⁷ the defendant sent to a third person a postcard containing a defamatory statement relating to the plaintiff. The plaintiff's name, however, was not mentioned in it, and no stranger unacquainted with the circumstances would have known to whom it referred. It was held that there was no sufficient publication to the postman or other persons through whose hands the postcard passed.⁸

Publication presumed in certain cases.

5. Publication will be presumed, and the burden of disproving it lies upon the defendant, in all cases in which the document is so put in the way of being read and understood by someone, that it is probable that he actually read and understood it. Thus it is a sufficient proof of publication to prove that a letter was posted, and therefore probably read by the person to whom it was addressed or by his clerks; or that a postcard was posted, and therefore probably read by the post-office officials or by the family or servants of him to whom it was sent; or that a document was printed, and therefore published to the compositors; or that a telegram was despatched, and therefore read by the telegraph operators.⁹

Unintentional publication.

6. Publication need not be intentional, for it is sufficient if it is due to the negligence of the defendant; but an unintentional publication due to no negligence is not actionable. Thus a publication to the wrong person by mistake is a ground of action; as when a document is meant to be sent to the plaintiff himself, or to some person privileged to receive it, and it is sent in error to someone else.¹⁰ So a negligent statement of something not intended to be stated at all is actionable; as in *Shepherd v. Whitaker*,¹¹ where the defendants mistakenly

⁷ (1901) 2 K.B. 1.

⁸ No action would lie for the publication to the person to whom the card was addressed, since, so far as he was concerned, the communication was privileged. See as to privilege p. 395, below.

⁹ *Sadgrove v. Hole* (1901) 2 K.B. 1; *Warren v. Warren* (1834) 1 C.M. & R. 250, 40 R.R. 547.

¹⁰ *Fox v. Broderick* (1864) 14 Ir. C.L. Rep. 453; *Hebditch v. McIlwaine* (1894) 2 Q.B. 54, overruling *Tompson v. Dashwood* 11 Q.B.D. 43.

¹¹ (1875) L.R. 10 C.P. 502.

inserted in their newspaper the name of the plaintiffs' firm under the head of "First meetings under the Bankruptcy Act," instead of under that of "Dissolutions of Partnership." Similarly the publication of a document which is not known by the defendant to contain the defamatory statement complained of, but which he ought to have known to do so, is a good ground of action. In *Vizetelly v. Mudie's Select Library*¹² the defendants were successfully sued for putting in circulation a book containing a passage defamatory of the plaintiff, the jury finding as a fact that the defendants were negligent in not taking any precautions to ascertain the nature of the books issued by them. On the other hand, if there is no negligence in such case, the innocent disseminator of defamatory literature is not responsible. In *Emmens v. Pottle*,¹³ for example, it was held that a news-vendor was not liable for a libel contained in a newspaper sold by him in the ordinary course of business, there being, as the jury found, no knowledge of the existence of the libel nor any negligence in failing to acquire such knowledge.

On the same principle it is actionable to communicate negligently a statement known to be defamatory, but not intended to be published: as when a man, talking scandal to his wife, negligently allows it to be overheard by a third person; or when he posts to the plaintiff himself, or to a privileged person a defamatory message written on a postcard, instead of in a closed letter.¹⁴ So it is actionable to send a defamatory letter to the plaintiff addressed in such a way that in the ordinary course of business it will be opened by the plaintiff's clerks.¹⁵ Even the publication of the letter to the defendant's own clerks in the ordinary way of business is sufficient to create liability.¹⁶

§ 138.—Justification.

1. No action will lie for the publication of a defamatory statement, if the defendant pleads and proves that it is true. Truth a good
defence.
"For the law will not permit a man to recover damages in

¹² (1900) 2 Q.B. 170.

¹³ (1885) 16 Q.B.D. 354.

¹⁴ *Sadgrove v. Hole* (1901) 2 K.B. 1.

¹⁵ *Pullman v. Hill* (1891) 1 Q.B. 524.

¹⁶ *Pullman v. Hill* (1891) 1 Q.B. 524. *Aliter*, if the occasion is one of privilege: *Boxsius v. Goblet Freres* (1894) 1 Q.B. 842; *Edmondson v. Birch & Co.* (1907) 1 K.B. 371. See *infra*, p. 404.

respect of an injury to a character which he either does not or ought not to possess." ¹ And this is so, even though the defendant is proved to have been actuated by malicious and improper motives.

Aliter in a criminal prosecution.

2. In a criminal prosecution for libel the rule is different. At common law the truth was no defence at all on an indictment; but by statute ² the publication of the truth, however defamatory, is no longer a criminal offence, if the jury is of opinion that the publication of it was for the public benefit. The truth of a matter which does not concern the public is still no defence on a criminal charge, though it is a bar to any civil proceedings.

Burden of proof.

3. The defence that the statement is true is termed a plea of justification, the defendant being said to justify the publication. The burden of proof rests upon the defendant; it is for him to prove that the statement is true, not for the plaintiff to prove that it is false. ³ The defence is a dangerous one, for an unsuccessful attempt to establish it may be treated as an aggravation of the original injury.

Honest belief in truth of statement no defence.

4. If the statement is in fact false, it is no defence at all that the defendant honestly and on reasonable grounds believed it to be true. He who attacks the reputation of another does so at his peril; and mistake, however inevitable, is no excuse. A rule which thus makes an innocent error the ground of serious liability is capable on occasion of working grave hardship, but on the whole it is doubtless just and expedient to accept no such excuse from those who without sufficient occasion attack, however honestly, the good name of others. When, on the other hand, there is a sufficient occasion for the publication—some reason of duty or legitimate self-interest, for example—the defendant is exempted, as we shall see, from the rigour of this rule, and is free from liability from error, so long as he acts honestly and from proper motives.

Sufficient if statement substantially true.

5. On a plea of justification it is not necessary to prove that the statement is literally true; it is sufficient if it is true

¹ *McPherson v. Daniels* (1829) 10 B. & C. p. 272; 34 R.R. p. 405.

² 6 & 7 Vict. c. 96, s. 6.

³ *McPherson v. Daniels* (1829) 10 B. & C. p. 272; 34 R.R. 405.

in substance. And it is true in substance, if the essence of the imputation is true, and if the erroneous details in no way aggravate the defamatory character of the statement or alter its nature. Thus a statement that the plaintiff had been convicted of travelling in a train without a ticket, and had been fined one pound with *three weeks'* imprisonment in default of payment, was held sufficiently justified by proof that he had been fined one pound for that offence with a *fortnight's* imprisonment in default of payment.⁴ On the other hand, it is no justification of the statement that the plaintiff is a libellous journalist, to prove that he has libelled one man; for the true meaning of the statement in question is that he habitually publishes libels.⁵

6. When the defamatory statement is put forward by way of rumour or report only, it is not sufficient justification to prove that the rumour or report really existed; it is necessary to prove that it was true. For to give to it further currency is to suggest that it may be well founded, and it is this suggestion that must be justified. On the same principle it is defamatory and actionable to publish of the plaintiff that he is suspected of some crime or other discreditable conduct; and it is no defence to prove that such a suspicion actually existed. Were it not for this rule, every man could escape the consequences of publishing libels and slanders, by adopting the simple precaution of stating them as matters of rumour and suspicion, instead of as matters of fact.⁶

Statements
by way of
rumour or
report.

§ 139.—Privilege.

1. We have seen that in general he who publishes a defamatory statement does so at his peril, and is liable if this statement turns out not to be true, however honestly and carefully he may have acted, and however inevitable his mistake. This rule is subject to a number of important exceptions which are grouped together under the title of Privilege. A

Privilege
defined. j

⁴ *Alexander v. N.E. Ry. Co.* (1865) 6 B. & S. 340.

⁵ *Wakley v. Cooke* (1849) 4 Ex. 511.

⁶ *Watkin v. Hall* (1868) L.R. 3 Q.B. 396; *McPherson v. Daniels* (1829) 10 B. & C. 263, 34 R.R. 397; *Monson v. Tussaud's Ltd.* (1894) 1 Q.B. 671.

privileged statement may be defined as one which is made in such circumstances as to be exempt from the rule that a man attacks the reputation of another at his own risk. In other words, privilege includes all those exceptional cases in which it is not enough, in order to create liability, to prove that the defendant has published a false and defamatory statement. The defendant, being privileged, is not responsible for this alone, but is either wholly free from responsibility, or is liable only on proof that he was animated by a malicious motive and not by any genuine intention to use his privilege for the purpose for which the law gave it to him.¹

The cases in which privilege exists are. speaking generally, those in which there is some just occasion for publishing defamatory matter in the public interest or in the furtherance or protection of the rights or lawful interests of individuals. In such cases the exigency of the occasion amounts to a lawful excuse for the attack so made upon the plaintiff's reputation. The right of free speech is allowed wholly or partially to prevail over the right of reputation. For while it is just and reasonable to maintain the rule that he who wantonly and without just and necessary occasion attacks the reputation of another, however honestly, must answer for the actual truth of his words, this rule would be unwarrantably severe in its application to those who, in the performance of public or private duty, or in the legitimate protection of public or private interests, find it necessary to make imputations upon the good name of other persons.

Privilege and
justification.

2. If the defamatory statement can be shown to be true, the defence of privilege is not required; for it is allowable to publish the truth on all occasions, privileged or not, and from all motives good or bad. It is only when the statement is false, or cannot be proved to be true, that it is necessary to fall back upon the plea of privilege, and to prove that the occasion of the publication was such as to exempt the defendant from the consequences of his error. Whenever privilege exists, however, it is wise to plead it instead of or along with a plea of justification; for the latter is a dangerous weapon, which often fails and even injures him who uses it.

¹ See *Stuart v. Bell* (1891) 2 Q.B. p. 345.

3. Privilege is of two kinds, distinguished as absolute and qualified. A statement is said to be absolutely privileged when it is of such a nature that no action will lie for it, however false and defamatory it may be, and even though it is made maliciously—that is to say, from some improper motive. The right of free speech is allowed to prevail wholly over the right of reputation. These cases are at the opposite extreme from the ordinary cases of unprivileged defamation. When a statement is not privileged, it is actionable, however honest its publication may have been ; but if it is absolutely privileged, it is not actionable, however dishonest its publication may have been. As may be expected, the cases in which the right of free speech can be placed at so high a level are few in number and quite exceptional in character.

Absolute and qualified privilege.

4. Qualified privilege, on the other hand, exists when the defendant is exempted from the rule of strict liability, not absolutely, but only conditionally on the absence of malice. Malice means in this connection the presence of an improper motive—a purpose to abuse the privilege for some indirect object, instead of a purpose to use it for the end for which the law provides it. Qualified privilege, therefore, is an intermediate case between total absence of privilege and the presence of absolute privilege.²

§ 140.—Absolute Privilege.

1. The following statements are absolutely privileged, so that no action will lie in respect of them, however false, defamatory, and malicious they may be :—

Cases of absolute privilege.

- (a) Any statement made in the course of and with reference to judicial proceedings by any judge, jurymen, party, witness, or advocate.

² The exposition of the law of defamation was at one time encumbered by a useless legal fiction known as the doctrine of implied malice. It used to be said that malice was an essential element in all actions for libel and slander, whether the occasion was privileged or not ; but that when there was no privilege, malice was conclusively presumed from the mere fact of publication. The existence of privilege, on the other hand, excluded any such presumption. Absolute privilege excluded it conclusively ; but when the privilege was qualified merely, it remained open to the plaintiff to prove as a fact that malice existed. Malice which was thus presumed in law was called implied malice, while that

- (b) Any statement made in Parliament by a member of either House.
- (c) Any statement made by one officer of state to another in the course of his official duty.
- (d) Fair, accurate, and contemporaneous reports of public judicial proceedings published in a newspaper.
- (e) Parliamentary papers published by the direction of either House, and any republication thereof by any person in full.

Judicial
privilege.

2. *Judicial Privilege*. "The authorities establish beyond all question this; that neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in office; that no action for libel or slander lies whether against judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any court recognised by law, and this though the words were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed. This absolute privilege has been conceded on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist, and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege, and who have the power and ought to have the will to check any abuse of it by those who appear before them."¹

The privilege extends to all courts, superior and inferior, civil and military.² But it does not apply to officials possessing merely administrative as opposed to properly judicial functions; and it makes no difference that in the performance of these administrative functions they exercise a judicial

which was proved as a fact in cases of qualified privilege was known as express or actual malice. Implied malice has now been eliminated from the law. It is now recognised that malice is no more an essential element in the wrong of defamation than in that of trespass or conversion.

¹ *Royal Aquarium v. Parkinson* (1892) 1 Q.B. p. 451, *per* Lopes L.J.

² *Scott v. Stansfield* (1868) L.R. 3 Ex. 220 (county court); *Thomas v. Churton* (1862) 2 B. & S. 475 (coroner); *Hodson v. Pare* (1899) 1 Q.B. 455 (justice of the peace); *Dawkins v. Lord Rokeby* (1873) L.R. 8 Q.B. 255 (court martial); *Law v. Llewellyn* (1906) 1 K.B. 487 (magistrate).

discretion. Thus a meeting of the London County Council engaged in hearing applications for music and dancing licenses is not a court within the meaning of the rule, and statements made by a member of that body are not absolutely privileged.³ The privilege extends not merely to judges,⁴ but to witnesses,⁵ parties,⁶ and advocates.⁷ It includes not merely statements made by a witness in court, but also statements made by him to a party, or to the party's solicitor, in the course of preparation for trial.⁸

The statement in order to be privileged need not be relevant, in the sense of having a material bearing upon the matter in issue in the case. Thus the statement of a witness is privileged, even though inadmissible as evidence, and even though so immaterial that no prosecution for perjury would be possible in respect of it. Nevertheless the statement, though it need not be relevant in this sense, must, it would seem, be made in the course of and with reference to the case in hand. A judge who from the bench made a defamatory observation in respect of some entirely extraneous matter would no longer be speaking in his capacity as a judge and would have no privilege.⁹

3. *Parliamentary Privilege*. "It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person."¹⁰ Parliamentary privilege.

4. *Official Privilege*. It was decided by the Court of Appeal in *Chatterton v. Secretary of State for India*¹¹ that an official communication made by the Secretary of State for India to Official privilege.

³ *Royal Aquarium v. Parkinson* (1892) 1 Q.B. 431.

⁴ *Scott v. Stansfield* (1868) L.R. 3 Ex. 220.

⁵ *Seaman v. Netherclift* (1876) 2 C.P.D. 53; *Barratt v. Kearns* (1905)

1 K.B. 504.

⁶ *Hodson v. Pare* (1899) 1 Q.B. 455.

⁷ *Munster v. Lamb* (1883) 11 Q.B.D. 588.

⁸ *Watson v. McEwen* (1905) A.C. 480.

⁹ See *Seaman v. Netherclift* (1876) 2 C.P.D. p. 56; *Munster v. Lamb* (1883) 11 Q.B.D. 588.

¹⁰ *Ex parte Wason* (1869) L.R. 4 Q.B. p. 576.

¹¹ (1895) 2 Q.B. 189.

the Under-Secretary for the purpose of enabling the latter to answer a question in the House of Commons was absolutely privileged. "It is not competent to a civil court," says Lord Esher,¹² "to entertain a suit in respect of the action of an official of state in making such a communication to another official in the course of his official duty, or to inquire whether or not he acted maliciously in making it." It does not clearly appear, however, what classes of public servants are to be deemed "officials of state" within the meaning of this rule.¹³

Privileged
reports.

5. *Reports of Judicial Proceedings.* By the Law of Libel Amendment Act, 1888,¹⁴ it is provided that: "A fair and accurate report in any newspaper¹⁵ of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged, provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter." It is submitted that the word *privileged* in this section means absolutely privileged, but its interpretation is far from clear.¹⁶ If any of the conditions mentioned in this section are absent, a report of judicial proceedings falls within the rule of the common law and possesses a merely qualified privilege.

Parliamentary
papers.

6. *Parliamentary Papers.* By 3 & 4 Vict. c. 9, absolute privilege is conferred upon the publication by order of either House of Parliament of the reports, papers, votes, or proceedings of either House, and also upon the republication in full of any documents of this nature, which have been already published by such authority. At common law the protection accorded to statements made in Parliament did not extend to the publication of defamatory documents elsewhere, even by order of one of the Houses¹⁷; and this Act was passed to alter the law in this respect.¹⁸

¹² *Ibid.*, p. 191.

¹³ As to official communications in military and naval matters, see *Dawkins v. Lord Paulet* (1869) L.R. 5 C.B. 94. Odgers on Libel p. 231, 4th ed.

¹⁴ 51 & 52 Vict. c. 64, s. 3. ¹⁵ As defined in s. 1.

¹⁶ See Odgers on Libel, p. 306, 4th ed.

¹⁷ *Stockdale v. Hansard* (1839) 9 A. & E. 1; 48 R.R. 326.

¹⁸ The publication of extracts from or abstracts of parliamentary papers is the subject of *qualified* privilege only. 3 & 4 Vict. c. 9, s. 2.

§ 141.—Qualified Privilege.

1. A statement is said to possess a qualified privilege when, **Malice defined.** although false and defamatory, it is not actionable without proof of malice. Malice means the presence of an improper motive ; a statement is malicious, when it is made for some purpose other than the purpose for which the law confers the privilege of making it “ If the occasion is privileged, it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive.”¹

2. It is neither necessary nor sufficient to constitute **Negligence irrelevant.** liability, that the statement was made without reasonable and probable cause. Not necessary—for if the statement is made maliciously, and is in fact false, the defendant is liable for it although he had good grounds for believing it to be true ; malice destroys the privilege and leaves the defendant subject to the ordinary law by which a mistake, however reasonable, is no defence. Neither is the absence of reasonable and probable cause sufficient in itself to constitute liability. The law requires that a privilege shall be used honestly, but not that it shall be used carefully. Negligence in making defamatory statements on a privileged occasion is not actionable.² The unreasonableness of the defendant's belief may, however, amount to evidence of malice.³

3. The absence of any genuine belief in the truth of the **Wilful falsehood.** statement is conclusive proof of malice, for the defendant cannot have had a proper motive in saying what he did not believe to be true.⁴ On the other hand a genuine belief in the truth of the statement is quite consistent with the existence of malice. It is not enough to avoid liability that the

¹ *Clark v. Molyneux* (1877) 3 Q.B.D. at p. 246 *per* Brett, L.J. For similar definitions of malice see *Nevill v. Fine Arts Insurance Co.* (1895) 2 Q.B. p. 171; *Royal Aquarium Co. v. Parkinson* (1892) 1 Q.B. p. 454.

² *Clark v. Molyneux* (1877) 3 Q.B.D. 244 ; *Pittard v. Oliver* (1891) 1 Q.B. 474.

³ *Royal Aquarium Co. v. Parkinson* (1892) 1 Q.B. p. 454.

⁴ See the authorities on proof of malice in cases of malicious prosecution. *Infra*, § 155 (10).

defendant said what he believed to be true; he must have said it for the purpose for which the law allows such statements to be made.

Privilege a question of law.

4. Whether a statement is privileged is a question of law for the judge. The question for the jury is not whether the statement is privileged, but whether it was made maliciously, so that the privilege was thereby forfeited.⁵ Yet if there is any preliminary question of fact on which this question of law depends, then that fact must be determined by the jury. Thus it is a rule of law that an accurate report of judicial proceedings is privileged, but it is a question of fact for the jury whether the report is accurate or not.

Malice a question for the jury.

5. The existence of malice is a question of fact for the jury, but the burden of proof lies upon the plaintiff, and the judge has to be satisfied that there is some reasonable evidence of malice to go to the jury. On a plea of privilege it is not for the defendant to prove that he used his privilege honestly and for its proper purpose; it is for the plaintiff to prove that the privilege was maliciously abused. Since the burden of proof thus rests upon the plaintiff, the question of malice must not be left to the jury, unless the plaintiff has produced reasonable evidence of its existence.⁶

Evidence of malice,

6. Evidence of malice may be either intrinsic or extrinsic. Intrinsic evidence consists in the contents of the statement itself. Its language, for example, may be so violent or insulting—it may go so far beyond the just requirements of the occasion—as to amount in itself to sufficient evidence of malice.⁷ Extrinsic evidence consists in the circumstances under which the statement was made—circumstances which go to show that the statement, even though moderate and justifiable in its language, was in reality animated by some

⁵ *Nevill v. Fine Arts Insurance Co.* (1895) 2 Q.B. at p. 169; *Stuart v. Bell* (1891) 2 Q.B. at p. 345.

⁶ *Somerville v. Hawkins* (1851) 10 C.B. 583; *Laughton v. Bishop of Sodor & Man* (1872) L.R. 4 P.C. 495; *Jenoure v. Delmege* (1891) A.C. 73; *McQuire v. Western Morning News* (1903) 2 K.B. 100; *Clark v. Molyneux* (1877) 3 Q.B.D. 237.

⁷ *Laughton v. Bishop of Sodor & Man* (1872) L.R. 4 P.C. at p. 505; *Spill v. Maule* (1869) L.R. 4 Ex. 232; *Clark v. Molyneux* (1877) 3 Q.B.D. p. 245.

improper motive. It is not necessary that the plaintiff should prove affirmatively what this improper motive really was ; it is sufficient to disprove the existence of a proper motive : for example, by showing that the defendant had no genuine belief in the truth of the statement.⁸

7. Privilege is forfeited, if it is exceeded ; that is to say, if the publication of the defamatory statement is more extensive than the occasion of the privilege requires and justifies. Certain forms of privilege, indeed, permit of publication to the whole world ; for example the reports of judicial proceedings, or fair comment on matters of public interest. Privilege such as this cannot be exceeded in the sense now under consideration. But in other cases the privilege is limited to a publication to certain persons only ; it is a right of restricted publication ; and any disregard, whether intentional or negligent, of the limits thus imposed is termed an excess of privilege, and deprives the defendant of the benefit of it.⁹ Thus in *Williamson v. Freer*¹⁰ it was held that a message which would have been privileged had it been sent in a closed letter, was unprivileged because sent by telegraph, for it was thereby published to the telegraph operator. Similarly a publication to a person who is mistakenly believed to be privileged to receive the communication, is an excess of privilege which will render the defendant liable.¹¹

Excess of
privilege.

No publication, however, which is reasonably necessary for the effective use of the defendant's privilege amounts to an excess of it. Thus it has been held that the act of the directors of a company in printing for distribution among the shareholders an auditor's report on the affairs of the company was not an excess of privilege.¹² So it has been held that defamatory statements made at a meeting of a board of guardians were privileged, notwithstanding the presence of reporters for

⁸ *Clark v. Molyneux* (1877) 3 Q.B.D. p. 245.

⁹ There is another use sometimes made of the phrase excess of privilege, in which it means not an excessive publication of a privileged statement, but the improper and malicious use of that privilege. In this latter sense evidence of excess means merely evidence of malice.

¹⁰ (1874) L.R. 9 C.P. 393.

¹¹ *Hebditch v. MacIlwaine* (1894) 2 Q.B. 54.

¹² *Lawless v. Anglo-Egyptian Cotton Co.* (1869) L.R. 4 Q.B. 262.

the press.¹³ So a solicitor writing a defamatory and privileged letter on behalf of his client does not exceed and forfeit his privilege by publishing the letter in the ordinary course of business to his clerks.¹⁴ So in *Edmondson v. Birch & Co.*¹⁵ it was held that a company sending letters and telegrams on a privileged occasion to another company carrying on business abroad was not liable for publishing those letters and telegrams to its own servants in the ordinary way of business. "The person exercising the privilege," says Collins, M.R.,¹⁶ "is entitled to take all reasonable means of so doing and those reasonable means may include the introduction of third persons, where that is reasonable and in the ordinary course of business; and if so, it will not destroy the privilege." So Fletcher Moulton, L.J., says:¹⁷ "If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business."¹⁸

Cases of
qualified
privilege.

8. The chief instances of qualified privilege are the following:—

- (a) Statements made in the performance of a duty.
- (b) Statements made in the protection of an interest.
- (c) Fair comment on matters of public interest.
- (d) Reports of parliamentary, judicial, and certain other public proceedings

§ 142.—Statements in Performance of Duty.

Duty to
make a
statement.

1. A statement is conditionally privileged, if it is made in the performance of any legal or moral duty imposed upon the person making it.¹

¹³ *Pittard v. Oliver* (1891) 1 Q.B. 474.

¹⁴ *Boxsius v. Goblet Freres* (1894) 1 Q.B. 842.

¹⁵ (1907) 1 K.B. 371.

¹⁶ At p. 380.

¹⁷ At p. 382.

¹⁸ Since *Boxsius v. Goblet Freres* (1894) 1 Q.B. 842 and *Edmondson v. Birch & Co.* (1907) 1 K.B. 371, the earlier case of *Pullman v. Hill* (1891) 1 Q.B. 524 can be regarded as nothing more than a decision that on the particular facts of the case the communication to the defendants' clerks was not necessary or in the ordinary course of business.

¹ *Toogood v. Spyring* (1834) 1 C.M. & R. 181, 40 R.R. 523; *Stuart v. Bell* (1891) 2 Q.B. 341.

The hard rule of absolute liability for error is applicable only to those persons who, without any just call or occasion, venture to attack the reputation of others. But where a defamatory statement is made in the fulfilment of a duty, there is no liability in the absence of malice. The duty need not be, and indeed seldom is, one enforceable at law; it is sufficient that by the moral standard of right conduct prevalent in the community the defendant lay under an obligation to say what he did. It is not enough that he believed himself to be under such an obligation. "The question is, what is the defendant's duty, not what he thinks to be his duty."² It is for the judge, and not for the jury, to decide whether on the facts as proved such a duty existed.³

2. An important kind of duty which will give privilege to a defamatory statement is the duty of answering inquiries made by some person having a lawful interest in the matter. Thus an employer may answer questions as to the character of a former servant, made by any person proposing to engage that servant.⁴ So one trader may answer the inquiries of another as to the solvency of a third with whom the second proposes to do business.⁵ So an accusation of crime is privileged, if made in reply to questions made by the police with a view of detecting an offender.⁶

3. A communication which is volunteered, without any inquiry on the part of any one possessing a lawful interest, is unprivileged, unless there is some such confidential or other relation between the parties as creates a duty to speak without being asked. Thus the relation of master and servant will justify the servant in telling his master facts which concern his interest in relation to the matters intrusted to the servant.⁷ For the same reason a father or other near relative may warn a lady as to the character of the man whom she proposes to

² *Whitely v. Adams* (1863) 15 C.B. (N.S.) p. 412. See also *Stuart v. Bell* (1891) 2 Q.B. 341.

³ *Stuart v. Bell* (1891) 2 Q.B. p. 350.

⁴ *Jackson v. Hopperton* (1864) 16 C.B. (N.S.) 829.

⁵ *Robshaw v. Smith* (1878) 38 L.T. (N.S.) 423.

⁶ *Kine v. Sewell* (1838) 3 M. & W. 297; 49 R.R. 603.

⁷ *Lawless v. Anglo-Egyptian Cotton Co.* (1869) L.R. 4 Q.B. 262; *Cooke v. Wildes* (1855) 5 E. & B. 328.

marry.⁸ So a host owes a duty to his guest which will justify him in warning his guest against a servant suspected of dishonesty.⁹ So the members of borough councils and other public bodies are privileged in respect of communications made to one another in the honest fulfilment of their functions.¹⁰ So a solicitor owes a duty to his client, which confers upon the solicitor the same privilege, if any, that is possessed by his client in the matter.¹¹

§ 143.—Statements in the Protection of an Interest.

Interest in making statement.

1. Even when there is no duty to make the statement, it is nevertheless privileged, if it is made in the protection of some lawful interest of the person making it: for example, if it is made in the defence of his own property or reputation.

Private interest.

Thus a master has a sufficient interest in the honesty of his servants to be privileged in warning them against the character of their associates.¹ So a tenant may make a complaint to his landlord of the conduct of persons engaged by the latter to effect repairs to the premises.² Conversely a landlord may complain to his tenant of the conduct of the latter's lodgers as having a tendency to bring the house into disrepute.³ So joint owners of property, or partners in the same business, or shareholders in the same company may make privileged communications to each other in defence and furtherance of their common interests.⁴

Public interest.

2. The same principle is applicable even when the interest of the defendant is merely the general interest which he possesses in common with all others in the honest and efficient exercise by public officials of the duties intrusted to them. Thus

⁸ *Todd v. Hawkins* (1837) 8 C. & P. 88; 56 R.R. 834.

⁹ *Stuart v. Bell* (1891) 2 Q.B. 341.

¹⁰ *Andrews v. Nott Bower* (1895) 1 Q.B. 888.

¹¹ *Baker v. Carrick* (1894) 1 Q.B. 838.

¹ *Somerville v. Hawkins* (1851) 10 C.B. 583; *Hunt v. Gt. N. Rly. Co.* (1891) 2 Q.B. 189.

² *Toogood v. Spyring* (1834) 1 C.M. & R. 181; 40 R.R. 523.

³ See *Knight v. Gibbs* (1834) 1 A. & E. 43; 40 R.R. 247.

⁴ *Lawless v. Anglo-Egyptian Cotton Co.* (1869) L.R. 4 Q.B. 262; *Quartz Hill Gold Mining Co. v. Beall* (1882) 20 Ch.D. 501.

any member of the public may make charges of misconduct against any servant of the Crown, and the communication will be privileged.⁵ But the charge must be made to the proper persons; that is to say, to those who have the control of the official whose conduct is impugned. A communication to the wrong person, and *a fortiori* a publication of the complaint to the world at large in a newspaper or otherwise, is an excess of privilege, and the privilege will be thereby forfeited.⁶

3. This privilege of making complaints against public officials must not be confounded with the privilege of making fair comments on matters of public interest, which will be discussed in the succeeding section. The former privilege deals with false and defamatory statements of fact, not with defamatory comment on proved or admitted facts. A comment may be published to all the world; a specific charge of misconduct must be published only to the persons in authority over the offender.

§ 144.—Fair Comment.

1. A statement is privileged if it is a fair comment on a Fair matter which is of public interest or is submitted to public comment. criticism.¹

2. Comment or criticism must be carefully distinguished Distin- from a statement of fact. The former is privileged, if it guished from relates to a matter which is of public interest; the latter is statements of fact. unprivileged and actionable, even though the facts so stated would, if true, have possessed the greatest public interest and importance. "The distinction," says the Privy Council in *Davis v. Shepstone*,² "cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise even with severity the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct." So also in the Irish case of *Lefroy*

⁵ *Harrison v. Bush* (1855) 5 E. & B. 344.

⁶ *Purcell v. Sowler* (1878) 2 C.P.D. 215.

¹ *Henwood v. Harrison* (1872) L.R. 7 C.P. 806; *Thomas v. Bradbury Agnew & Co.* (1906) 2 K.B. 627.

² (1886) 11 A.C. p. 190.

v. *Burnside*³ it is said : " That a fair and *bona fide* comment on a matter of public interest is an excuse of what would otherwise be a defamatory publication is admitted. The very statement, however, of this rule assumes the matter of fact commented upon to be somehow or other ascertained. It does not mean that a man may invent facts, and comment on the facts so invented, in what would be a fair and *bona fide* manner on the supposition that the facts were true."

Comment or criticism is essentially a statement of opinion as to the estimate to be formed of a man's character or actions. Being therefore a mere matter of opinion, and so incapable of definite proof, he who expresses it is not called upon by the law to justify it as being true, but is privileged to express it, even though others disagree with it, provided that it is fair and honest. Thus it is comment to say that a certain act done by the plaintiff is unwise or absurd ; but it is an unprivileged statement of fact to say that he committed the act so criticised.

Statements
of fact
privileged
as incidental
to fair
comment.

3. Notwithstanding the distinction thus drawn between comment and matter of fact, it would seem not to be true that a defamatory statement of fact can in no circumstances be covered by a plea of fair comment. The question is difficult and uncertain, but the rule may perhaps be formulated in some such way as this : That if an actual matter of fact is of such a nature as to be open to comment, and is fairly commented upon, the privilege attaching to this comment will include at the same time any subsidiary statements of fact, which are honestly and reasonably, even though mistakenly, made by way of inference from the principal fact. Thus in *Lefroy v. Burnside*⁴ it was said by Pallas, C.B. : " It was contended during the argument that the statement of one fact cannot be excused as fair comment upon another fact. That proposition is in my opinion far too wide, and I cannot concur in it ; but I think that when a matter of fact is to be excused as comment upon another fact, the fact alleged and sought to be excused must be a reasonable inference from the facts alleged, and upon which it is a comment. Whether the facts averred be capable of being reasonably inferred from such other facts is a matter

³ (1879) 4 L.R. Ir. p. 565.

⁴ (1879) 4 L.R. Ir. p. 566.

of law." For example, if the critic of a novel asserts on the ground of a remarkable coincidence, that the plot has been borrowed from that of another novel, the statement is one of fact, yet presumably it would be covered by a plea of fair comment and the critic would not be bound to plead justification.⁵

4. The right of privileged comment is limited to certain matters. The right of unprivileged comment is universal; there is full liberty to criticise all men and things, public and private, provided that the criticism is true. But it is only in a limited class of cases that there is any right to express one's own opinion honestly and fearlessly, regardless of whether others can be induced to agree with it or not. The cases in which this right of privileged comment exists may be divided into two classes: namely, (1) matters of public interest, and (2) matters which, although of no public interest, have been submitted to criticism by the persons concerned.

What matters may be commented on.

(a) *Matters of public interest*: for example, the administration of justice, the affairs of parliament, the conduct of the executive government and of public servants, the mode in which local authorities and other public bodies perform their functions, the management of public hospitals and other public institutions, the conduct of public worship in the Church of England. It makes no difference that the public interest of the matter in question is limited to a particular locality, instead of extending throughout the realm. That which is primarily of public interest to the citizens of Manchester is indirectly of public interest to all England.^{6 7}

Matters of public interest.

⁵ See *Joynt v. Cycle Trade Publishing Co.* (1904) 2 K.B. p. 297 per Williams, L.J.; *Dakhyl v. Labouchere* (1907) 23 T.L.R. p. 366 per Lord Atkinson.

⁶ *Purcell v. Sowler* (1877) 2 C.P.D. p. 218; *Cox v. Feeney* (1863) 4 F. & F. p. 20.

⁷ The following are examples of matters of public interest: *Henwood v. Harrison* (1872) L.R. 7 C.P. 606 (report of Board of Admiralty on the plans of a naval architect); *Wason v. Walter* (1868) L.R. 4 Q.B. 73 (petition to Parliament for removal of a judge); *Davis v. Duncan* (1874) L.R. 9 C.P. 396 (conduct of a meeting assembled to hear election address); *Hibbins v. Lee* (1864) 4 F. & F. 243 (conduct of magistrates); *Purcell v. Sowler* (1878) 2 C.P.D. 215 (administration of the poor law); *Kelly v. Tinsling* (1865) L.R. 1 Q.B. 699 (conduct of public worship).

Matters
submitted
to public
criticism.

(b) *Matters submitted to public criticism by the persons concerned.* He who voluntarily gives up his right of privacy by submitting himself or his deeds to public scrutiny and judgment must submit to the exercise of a right of public comment. This right, therefore, includes books and every form of published literature, works of art publicly exhibited, and public musical or dramatic performances. So also with any form of appeal to the public, such as advertisements, circulars, or public speeches.⁸

Comment
on moral
character.

5. A man's moral character is not a permissible subject of adverse comment, and this is so even though the person so attacked occupies some public position which makes his character a matter of public interest. He who says or suggests that a person is dishonest, corrupt, immoral, untruthful, inspired by base and sordid motives, cannot defend himself by a plea of fair comment, but must justify his accusation by proving it to be true. It is privileged fair comment to accuse a man of folly, but not to accuse him of vice; of want of dignity, but not of want of honesty; of incapacity, but not of corruption; of bad taste, but not of mendacity. This important limitation upon the right of criticism was established by the decision of the Court of Queen's Bench in *Campbell v. Spottiswoode*⁹ in which it was held actionable to suggest, however honestly, that the editor of a religious magazine, in advocating a scheme for missions to the heathen, was in reality an impostor inspired by motives of pecuniary gain. "I do not assent," says Cockburn, C.J., in his charge to the jury,¹⁰ "that . . . because a man is a public man, you are entitled, not only to point out the want of judgment, the want

In *South Hetton Coal Co. v. N. Eastern News Association* (1894) 1 Q.B. 133, it was held by the Court of Appeal that the sanitary condition of the cottages provided by a colliery company for its workmen was a matter of public interest, comment on which was privileged. See also *Joynt v. Cycle Trade Publishing Co.* (1904) 2 K.B. 292.

⁸ *Campbell v. Spottiswoode* (1863) 3 B. & S. 769; *Merivale v. Carson* (1887) 20 Q.B.D. 275; *McQuire v. Western Morning News* (1903) 2 K.B. 100; *Thomas v. Bradbury Agnew & Co.* (1906) 2 K.B. 627.

⁹ (1863) 3 B. & S. 769. See also *Parmiter v. Coupland* (1840) 6 M. & W. 105, 55 R.R. 529; *Joynt v. Cycle Trade Publishing Co.* (1904) 2 K.B. 292.

¹⁰ 32 L.J.Q.B. p. 192.

of discretion, the want of wisdom in his conduct, but that you may ascribe to him corrupt, dishonest, and wicked motives."

"A writer in a public paper," says the same judge,¹¹ "may comment on the conduct of public men in the strongest terms; but if he imputes dishonesty, he must be prepared to justify.

. It seems to me that a line must be drawn between hostile criticism on a man's public conduct and the motives by which that conduct may be supposed to be influenced; and that you have no right to impute to a man in his conduct as a citizen—even though it be open to ridicule or disapprobation—base, sordid, dishonest, and wicked motives, unless there is so much ground for the imputation that a jury shall be of opinion, not only that you may have honestly entertained some mistaken belief upon the subject, but that your belief is well founded and not without cause."

Some doubt, however, as to the real nature and scope of this limitation of the right of comment is created by certain observations in the recent case of *Dakhyl v. Labouchere*¹² in the House of Lords. It is suggested in this case that an attack upon a person's character may be covered by a plea of fair comment if it is made by way of a reasonable inference from some facts which are properly the subject of comment. "A personal attack," says Lord Atkinson,¹³ "may form part of a fair comment upon given facts truly stated, if it be warranted by those facts; in other words, in my view, if it be a reasonable inference from those facts."¹⁴

6. The comment must be *fair*, otherwise it will be actionable as unprivileged. This does not mean that the comment must be true; true comment needs no privilege, any more than any other true statement. "The jury," says Collins, M.R., in *McQuire v. Western Morning News*,¹⁵ "have no right to substitute their own opinion of the literary merits of the work for that of the critic, or try the fairness of the criticism by any such standard. Fair, therefore, in this collocation cer-

Comment
must be
fair.

¹¹ 32 L.J.Q.B. pp. 196, 199.

¹² (1907) 23 T.L.R. 364.

¹³ 23 T.L.R. p. 364.

¹⁴ As to the protection thus afforded by fair comment to statements which are made by way of reasonable inference but are not in themselves permissible comment, see *supra* p. 408,

¹⁵ (1903) 2 K.B. p. 109.

tainly does not mean that which the ordinary man, 'the man on the Clapham omnibus,' as Lord Bowen phrased it, the jurymen common or special, would think a correct appreciation of the work; and it is of the highest importance to the community that the critic should be saved from any such possibility."

7. Fair comment means comment honestly believed to be true, and not inspired by any malicious motive.¹⁶ Unfairness means the presence of malice. The absence of any genuine belief in the truth of the comment is conclusive proof of malice, for no man can have a proper motive for making defamatory statements which he does not believe to be justified. Even a comment genuinely believed to be true, however, will be actionable as unfair, if it is inspired by any improper and malicious motive.

This being the meaning of unfairness, it is manifest that the defence of fair comment is simply a particular instance of qualified privilege. Every man has a qualified privilege to comment on matters of public interest or submitted to public criticism, and this defence may be rebutted in the usual way by proof that the privilege has been maliciously abused.^{17 18}

¹⁶ *Thomas v. Bradbury Agnew & Co.* (1906) 2 K.B. 627; *McQuire v. Western Morning News* (1903) 2 K.B. 100.

¹⁷ The true nature and meaning of the defence of fair comment was long obscured by certain unfortunate dicta in the case of *Merivale v. Carson* (1887) 20 Q.B.D. 275, but the law has been once more put on a sound and intelligible basis by the decisions of the Court of Appeal in the two cases cited in the preceding note.

¹⁸ It is sometimes said that comment is also to be classed as unfair even in the absence of any dishonesty or malice, if the critic fails to show a certain degree of moderation, judgment, and competence. *Wason v. Waller* (1868) L.R. 4 Q.B. p. 96. It is said that there is a certain measure of violence or perverseness on the part of a critic, which will itself condemn his criticism as unfair and actionable. Notwithstanding the dicta to this effect, it is submitted that this is not so. The distinction thus suggested is merely one of degree, which it would be impossible to reduce to definiteness. To apply any such test would mean that any jury would be at liberty to find a comment unfair, simply because they did not agree with it and thought it unduly severe. It is submitted that the violence, exaggeration, or perverseness of a critic has not in itself any operation in making his criticism unfair, but is merely evidence that the criticism is not honest, or that it is inspired by malice.

It is sometimes said that comment is unfair if it is irrelevant, i.e., if it

8. The burden of proving that a comment is unfair is on the plaintiff who complains of it. Here, as in other cases of qualified privilege, it is for the plaintiff to rebut the defence of privilege by proving that it was abused and forfeited.¹⁹ Burden of proof.

9. Whether the comment is fair is a question of fact for the jury. But it is for the judge to decide in the first place (1) whether the subject is one which is in law open to comment, and (2) whether there is any reasonable evidence to go to the jury that the comment is unfair.²⁰ There are, therefore, two distinct checks on the action of a jury in the case of fair comment. In the first place, they are not at liberty to find for the plaintiff on the ground that in their opinion the matter was not a fit one for public comment; that is a question of law for the judge. In the second place, they are not at liberty to find for the plaintiff on the ground that the comment is unfair, unless the judge is first satisfied that there is sufficient evidence extrinsic or intrinsic, of unfairness, on which such a verdict could be found. Fairness a question for the jury.

§ 145.—Privileged Reports.

1. The following kinds of reports are conditionally privileged:— Privileged reports.

- (a) Fair and accurate reports of the public proceedings of any court of justice;¹

includes defamatory references to matters which are not in law a proper subject of criticism: *e.g.*, literary criticism which attacks the moral character of the author, instead of his competence. In such a case, however, the ground of liability is not strictly that the comment is unfair, and the critic's privilege abused and forfeited; but that no privilege to comment on such a matter has ever existed. So also it is sometimes said that a comment is unfair if it is not pure comment, but is mixed with inaccurate and defamatory statements of fact. Here also the logical view is not that the privilege has been abused and forfeited, but that it does not exist. Unfairness in the proper sense is always a question of fact for the jury; but whether a comment is relevant (*i.e.*, whether it is directed to matters capable of being the subject of public comment) is a question of law for the judge. So also the distinction between comment and statements of fact is a question of law for the judge, not of fact for the jury, and therefore must not be confounded with the question of fairness, which is solely for the jury.

¹⁹ *McQuire v. Western Morning News* (1903) 2 K.B. 100.

²⁰ *Ibid.*

¹ *Macdougall v. Knight* (1889) 14 A.C. 194; *Kimber v. Press Association* (1893) 1 Q.B. 65; *Usill v. Hales* (1878) 3 C.P.D. 319. Cf.

- (b) Fair and accurate reports of parliamentary debates ;²
- (c) Fair and accurate reports published in a newspaper of the proceedings of any public meeting or of any of the other kinds of meetings mentioned in section 4 of the Law of Libel Amendment Act 1888, provided that the matter published is of public concern and for the public benefit.³

§ 146.—Slander and Special Damage.

Slander not actionable without proof of damage.

1. Libel is in all cases actionable *per se*, but slander is not actionable without proof of special damage, save in certain exceptional cases.

2. The special damage required in actions for slander must be the loss of some definite material advantage ; it must not consist merely in the loss of reputation itself.⁴ A loss of the voluntary hospitality of friends is sufficient, however,⁵ and so also in all probability is a resulting separation between husband and wife.⁶

3. The special damage must not be too remote. Thus in *Speake v. Hughes*⁷ the plaintiff, a barman, was dismissed by his employer, because of a statement by the defendant that the plaintiff had removed from premises occupied by him without having paid his rent ; and it was held that no action lay, for the special damage proved was too remote. So in *Allsop v. Allsop*⁸ illness resulting from the mental trouble produced by slander was held too remote.⁹

Allbutt v. General Council of Medical Education (1889) 23 Q.B.D. 400. As already indicated (*supra*, p. 400) a newspaper report of judicial proceedings is the subject of a statutory privilege, probably absolute, if it fulfils the requirements of the Law of Libel Amendment Act 1888, sec. 3.

² *Wason v. Walter* (1868) L.R. 4 Q.B. 73.

³ 51 & 52 Vict. c. 64. At common law the reports of meetings are not privileged. The common law privilege of reporting is limited to judicial and parliamentary proceedings. *Purcell v. Sowler* (1877) 2 C.P.D. p. 220 *per* Mellish, L.J.

⁴ *Roberts v. Roberts* (1864) 5 B. & S. 384.

⁵ *Davies v. Solomon* (1871) L.R. 7 Q.B. 112 ; *Moore v. Meagher* (1807) 1 Taunt. 39.

⁷ (1904) 1 K.B. 138.

⁶ *Lynch v. Knight* (861) 9 H.L.C. 577.

⁸ (1860) 5 H. & N. 534.

⁹ See also *Lynch v. Knight* (1861) 9 H.L.C. 577.

4. In particular, special damage is too remote, if it is due, not to the original slander, but to a repetition of it by other persons.⁶ Therefore it is in ordinary cases insufficient for the plaintiff to prove that since the publication of the slander his business has fallen away; because such a result must have been due not to the original slander, but to the subsequent propagation of it by means of repetition.⁷ But it is otherwise if the original slander is published to so many persons, that the diminution of the plaintiff's business may be reasonably attributed to it rather than to subsequent repetition.⁸

Damage due
to repetition
of slander.

5. There are two exceptions to the rule that damage caused by the repetition of a slander is too remote: (1) when the original statement is made to a person who is under a legal or moral duty to repeat it;⁹ (2) when repetition is authorised or intended by the defendant, for it is a general rule that no result which is intended can be too remote.

6. It seems to be the better opinion that when special damage is proved, damages can be recovered not merely for it, but for the injury to the plaintiff's reputation generally. That is to say, compensation is not limited to the amount of actual loss proved, but proof of some actual loss is an essential foundation for a claim of general damages for slander.¹⁰

§ 147.—Slander Actionable *per se*.

1. In the following cases slander is actionable *per se* without proof of special damage:—

Cases of
slander
actionable
per se.

- (a) An imputation that the plaintiff has committed a criminal offence.
- (b) An imputation that the plaintiff suffers from an existing, contagious, venereal disease.¹
- (c) An imputation of unchastity against a woman.
- (d) An imputation against the plaintiff in the way of his business or office.

2. An imputation of a criminal offence, to be actionable *per se*, must amount to a direct charge, and must not be a mere suggestion or statement of suspicion.² The crime charged

Accusation
of crime.

⁶ *Ward v. Weeks* (1830) 7 Bing. 211.

⁷ *Dixon v. Smith* (1860)

5 H. & N. 450.

⁸ See *Ratcliffe v. Evans* (1892) 2 Q.B. 524.

⁹ *Derry v. Handley* (1867) 16 L.T. (N.S.) 263.

¹⁰ See *Dixon v. Smith* (1860) 5 H. & N. p. 453.

¹ *Bloodworth v. Gray* (1864) 7 M. & Gr. 334.

² *Simmons v. Mitchell* (1880) 6 A.C. 156.

need not be indictable ; but probably it must not be an offence punishable by fine merely.³

Accusation
of unchastity

3. At common law a verbal imputation of unchastity is not actionable *per se*, but it is now provided by the Slander of Women Act, 1891, that "words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable."

Imputations
in respect of
trade or
office.

4. Any defamatory imputation upon a man in the way of his profession, business, or office, is actionable *per se*: for example a charge of insolvency against a trader,⁴ of incompetence against a surgeon, of ignorance against a lawyer. A defamatory charge, however, against a man in respect of a business in which he is no longer engaged, or in respect of an office which he no longer holds, is not actionable *per se*.⁵ When the plaintiff's office is not one of profit, but one of honour only, such as that of a justice of the peace, words spoken of him in that regard, and imputing unfitness or incompetency, are not actionable *per se*, unless, if true, they would be a ground of deprivation.⁶

A charge is not actionable *per se*, merely because it tends to injure the plaintiff in the way of his business or office ; it must amount to a charge against him *in relation* to his business or office. Thus it is not actionable *per se* to impute dishonesty to a solicitor unless he is alleged to be dishonest towards his clients.⁷ Nor is it actionable *per se* to impute adultery to a physician, unless the charge involves a breach of his professional duty towards his patients.⁸ This distinction, however, is unsatisfactory ; for if the natural and probable result of a slander is to injure the plaintiff in his business, it is difficult to see how it can be maintained that the slander does not refer to him in the way of his business. The only reason why it injures a solicitor in his business, to say that he has defrauded some one who was not his client, is because it will probably be inferred from this that he will defraud his clients also.

³ *Webb v. Beavan* (1883) 11 Q.B.D 609.

⁴ *Brown v. Smith* (1853) 13 C.B. 596.

⁵ *Hopwood v. Thorn* (1849) 8 C.B. 293.

⁶ *Alexander v. Jenkins* (1892) 1 Q.B. 797. *Aliter* if the words impute dishonesty. *Booth v. Arnold* (1895) 1 Q.B. 571.

⁷ *Doyley v. Roberts* (1837) 3 Bing. N.C. 835, 43 R.R. 810 ; *Dauncey v. Holloway* (1901) 2 K.B. 441.

⁸ *Ayre v. Craven* (1834) 2 A. & E. 2 ; 41 R.R. 359.

CHAPTER XV.

DECEIT AND INJURIOUS FALSEHOOD.

Wrongs of fraud or misrepresentation are of two kinds, ^{Two kinds of fraud.} essentially distinct: (a) The wrong of deceiving the plaintiff, so that he causes harm to himself by his own mistaken act; (b) The wrong of deceiving other persons, so that they by their mistaken acts cause harm to the plaintiff. The first of these injuries may be called, in a narrow and specific sense of the term, the wrong of Deceit; the second has no recognised distinctive title, and in default of a better designation it will here be called the wrong of Injurious Falsehood. We proceed to consider these in the order mentioned.

§ 148.—Deceit.

1. The wrong of deceit consists in the act of making a Deceit wilfully false statement, with intent that the plaintiff shall act ^{defined.} in reliance on it, and with the result that he does so act and suffers harm in consequence.¹

2. The false statement may be made either by words or by Deceit by conduct. Any conduct designed to deceive another by leading ^{words or conduct.} him to believe that a certain fact exists is equivalent in law as in morals to a statement in words that that fact does exist. Thus it is a fraud to obtain goods in credit in Oxford by wearing without right an undergraduate's cap and gown,² or to take measures for concealing the defects of an article sold.³

3. In order to found an action for deceit the defendant must have made a *positive* false statement; a mere passive non-disclosure of the truth, however deceptive in fact, does not ^{Non-disclosure is not deceit.}

¹ *Pasley v. Freeman* (1789) 3 T.R. 51, 1 R.R. 634; *Smith v. Chadwick* (1882) 20 Ch. D. 27, 9 A.C. 187; *Derry v. Peek* (1889) 14 A.C. 337.

² *Rex v. Barnard* (1837) 7 C. & P. 784.

³ *Horsfall v. Thomas* (1862) 1 H. & C. p. 99.

amount to deceit in law. "No mere silence will ground the action of deceit."⁴ This rule, however, is subject to the following qualifications :

Exceptions.

(a) The non-disclosure of a part of the truth may make the statement of the residue positively false. It is permissible to tell the whole truth, or to tell none of it, but it is not always possible to tell merely part of it without falling into positive falsehood. "Half the truth," says Lord Chelmsford,⁵ "will sometimes amount to a real falsehood." "Every word," says James, L.J.,⁶ "may be true, but if you leave out something which qualifies it, you may make a false statement. For instance, if pretending to set out the report of a surveyor, you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual misstatement."

(b) Active concealment of a fact is equivalent to a positive statement that the fact does not exist. By active concealment is meant any act done with intent to prevent a fact from being discovered. For example, to cover over the defects of an article sold, with intent that they shall not be discovered by the buyer, has the same effect in law as a statement in words that those defects do not exist.⁷

(c) Possibly if the defendant makes a statement which he believes to be true, and he afterwards discovers that it is false, before it has been acted on by the plaintiff, or if he makes a statement which is true when made but becomes false to his knowledge before it has been acted on, it is his duty to disclose the truth, and a failure to do so will be accounted an actionable fraud. This, indeed, has never been decided, but it seems in conformity with principle.⁸

⁴ *Arkwright v. Newbold* (1881) 17 Ch.D. p. 318.

⁵ *Peek v. Gurney* (1873) L.R. 6 H.L. p. 392.

⁶ *Arkwright v. Newbold* (1881) 17 Ch.D. p. 318.

⁷ *Horsfall v. Thomas* (1862) 1 H. & C. 90 (cannon sold with flaw concealed by plugging); *Schneider v. Heath* (1813) 3 Camp. 506, 14 R.R. 825 (ship with rotten timbers taken from slipway, and put into water to conceal defects from purchaser).

⁸ It is maintained in a dictum of Lord Blackburn in *Brownlie v. Campbell* (1880) 5 A.C. at p. 950. In *Arkwright v. Newbold* (1881) 17 Ch.D. 301, the question is considered and left open by Cotton and James L.JJ. pp. 325, 329.

(d) In certain cases there is a statutory duty of disclosure, the breach of which is an actionable fraud.⁹

4. To found an action for the tort of deceit, the misrepresentation must be a false statement of *fact*, and not a mere broken promise. If the words of the defendant amount to a mere promise, they cannot be the basis of an action of tort, and impose no liability upon him unless they conform to all the requirements of a valid contract. There is no such thing known to the law as a promise which is not good enough for a contract, but the breach of which is actionable as a tort.¹⁰

Statement must be one of fact.

In the proposition that an action of deceit will lie only for a statement of fact, the term fact is used to include everything except a promise. Thus a statement of opinion, if wilfully false, is actionable as a tort.¹¹ Similarly there seems no real reason to doubt that an action will lie for a fraudulent misrepresentation of law.¹² So also an action of tort will lie for a false representation of intention. An unfulfilled *promise* to do a thing is actionable as a contract or not at all; a false statement of *intention* to do a thing may be actionable as a tort. Thus in *Edgington v. Fitzmaurice*¹³ the directors of a company were held liable for fraud in borrowing money on behalf of the company on a false statement of the purpose to which the loan was to be applied. "The state of a man's mind," says Bowen, L.J.,¹⁴ "is as much a fact as the state of his digestion."¹⁵

5. *The Rule in Derry v. Peek.* A false statement is not actionable as a tort unless it is wilfully false. Mere negligence in the making of false statements is not actionable either as deceit or as any other kind of tort. This is the anomalous rule established by the House of Lords in the leading case of

Statement must be wilfully false.

⁹ For example the Companies Act, 1900, s. 10.

¹⁰ *Jorden v. Money* (1854) 5 H.L.C. 185.

¹¹ *Anderson v. Pacific Insurance Co.* (1872) L.R. 7 C.P. p. 69.

¹² See *West Indian Commercial Bank v. Kitson* (1884) 13 Q.B.D. 360.

¹³ (1885) 29 Ch.D. 459.

¹⁴ At p. 483.

¹⁵ It is not an actionable fraud, however, for a seller or buyer to obtain an advantageous bargain by falsely stating that he is not prepared to take less or give more for the property than a certain sum. In such a case the plaintiff can show no legal damage; he has lost a better bargain, indeed, but he has lost nothing to which he had any legal right. *Vernon v. Keys* (1810) 12 East 632; 11 R.R. 499.

*Derry v. Peek*¹⁶. Although in almost all other forms of human action a man is bound to take reasonable care not to do harm to others, this duty does not extend to the making of statements on which other persons are intended to act.

*Derry v.
Peek,*

*Derry v. Peek*¹⁶ was a case in which the promoters of a company issued a prospectus containing a negligent misrepresentation as to the powers of the company, and in reliance on this statement the plaintiff took shares in the company. The promoters were held not liable in damages, on the ground that there was no proof that the error was fraudulent. So in *Le Lievre v. Gould*¹⁷ an architect was held not liable for negligence in giving to a builder erroneous certificates as to the progress of the work, in reliance on which the plaintiff advanced certain moneys to the builder, which were lost.¹⁸

Test of wilful
falsehood.

6. When, then, is a statement wilfully false within the meaning of the rule in *Derry v. Peek*? The test is the existence of a genuine belief in the truth of the statement. It is not necessary for liability that the defendant should have known it to be false; it is sufficient if he did not genuinely and honestly believe it to be true. Every statement is explicitly or implicitly a statement as to the belief of the speaker, and if that belief does not exist the statement is knowingly and wilfully false. "An untrue statement," says Lord Bramwell,¹⁹ "as to the truth or falsity of which the man who makes it has no belief, is fraudulent; for in making it he affirms he believes it, which is false." "To prevent a false statement being fraudulent," says Lord Herschell,²⁰ "there must, I think, always be an honest belief in its truth."

It is sometimes said that it is sufficient for liability that the statement should be made recklessly. The term recklessly, however, must here be taken to be used in a loose sense to indicate the absence of any genuine belief—the presence of conscious ignorance of the truth of the matter. Recklessness,

¹⁶ (1889) 14 A.C. 337.

¹⁷ (1893) 1 Q.B. 491.

¹⁸ See also *Low v. Bouverie* (1891) 3 Ch. 82; *Angus v. Clifford* (1891) 2 Ch. 449.

¹⁹ *Smith v. Chadwick* (1884) 9 A.C. p. 203.

²⁰ *Derry v. Peek* (1889) 14 A.C. p. 374.

in the proper sense of gross negligence, is no ground of liability. No negligence, however gross, amounts to fraud.

Although an absence of reasonable grounds for believing a statement to be true is not in itself a ground of liability, it is important evidence that no such belief really exists, and therefore that the defendant is guilty not of negligence, but of fraud. "The ground upon which an alleged belief was founded is a most important test of its reality."²¹

If a statement is ambiguous, it must be taken in the sense in which the defendant himself meant it ; that is to say, in the sense in which he intended that it should be understood by the plaintiff. It is immaterial that some other sense is more natural, and that the plaintiff understood the statement in that sense and was deceived by it. For in such a case the defendant is guilty of negligence only, and not of fraud.²²

7. The rule in *Derry v. Peek* is subject to the following exceptions :

(a) When there is a contractual relation between the plaintiff and defendant which involves a contractual duty to use care in the making of statements, the rule in *Derry v. Peek* is excluded. A person may take on himself by contract a duty which the common law does not impose upon him. An architect who misinforms his client as to the nature of the foundations required for a building, or a physician who gives erroneous advice to a patient, cannot defend himself on the ground that the misrepresentation was not a fraudulent one.

Exception to
rule in *Derry*
v. Peek.
Contractual
duty.

It is to be noticed, however, that even when there is a contractual duty of careful statement, the rule in *Derry v. Peek* is excluded only in favour of the person with whom the contract is made, and not in favour of third persons who are injured by negligent statements made in breach of it. Thus in *Dickson v. Reuter's Telegram Co.*²³ the defendant company negligently addressed and delivered to the plaintiffs a telegram

²¹ *Derry v. Peek* (1889) 14 A.C. p. 375, *per* Lord Herschell.

²² *Angus v. Clifford* (1891) 2 Ch. at p. 472, *per* Bowen, L.J. ; *Smith v. Chadwick* (1884) 9 A.C. at p. 201, *per* Lord Blackburn. There are, indeed, several *dicta* to the contrary, but they are prior to *Derry v. Peek* and must now be treated as unsound. See, for example, the *dictum* of Cotton, L.J., in *Arkwright v. Newbold* (1881) 17 Ch.D. at p. 322.

²³ (1877) 3 C.P.D. 1.

intended for another person, directing a shipment of barley from Valparaiso to England. The plaintiffs, believing that the message was meant for them, acted in pursuance of it and suffered serious loss. Yet it was held by the Court of Appeal that they had no cause of action. The misrepresentation was, indeed, the breach of a contractual duty of care, but the contract was made only with the sender of the telegram, and as between the recipient and the telegraph company it was *res inter alios acta*.

Agency.

(b) Every person who purports to act as the agent of another is deemed in law to have entered into an implied contract of warranty of authority with any person who contracts or otherwise deals with him in reliance on his authority. If, therefore, the agent misrepresents the existence or extent of his authority, he is liable in damages for any loss thereby suffered by those who have dealt with him—the rule in *Derry v. Peek* being excluded by the existence of a contract implied in law.²⁴

Estoppel.

(c) The rule as to estoppel by representation is not affected by *Derry v. Peek*, and may in certain cases so operate as to impose liability in damages for a false statement which is not fraudulent. A company, for example, which registers a forged transfer of shares is liable by way of estoppel to a purchaser who buys the shares in reliance on the share-certificate so issued. For the company is estopped from denying the truth of that certificate, and therefore the title of the plaintiff.²⁵

Physical harm.

(d) The rule in *Derry v. Peek* does not apply to cases in which physical harm to person or property is caused by dangerous chattels or premises negligently represented to be safe. Liability may or may not exist in these cases, but the question is governed by different considerations from those which relate to false representations in general. We have already considered the matter under the head of liability for dangerous property.²⁶

Directors' Liability Act.

(e) The rule in *Derry v. Peek* has been excluded by statute, namely the Directors' Liability Act, 1890, in the case of negli-

²⁴ *Collen v. Wright* (1857) 8 E. & B. 647; *Starkey v. Bank of England* (1903) A.C. 114.

²⁵ *In re Bahia and San Francisco Rly. Co.* (1868) L.R. 3 Q.B. 584.

²⁶ *Supra*, Ch. XII. *George v. Skivington* (1869) L.R. 5 Ex. 1, for example, may or may not be good law—and indeed is probably bad law—but it is not overruled by *Derry v. Peek*. See p. 363, above.

gent false statements contained in a prospectus issued by the promoters or directors of a company. The elaborate provisions of this enactment pertain rather to the law of companies than to that of torts, and need not be here considered.

8 A false statement is not actionable, whatever damage may result from acting in reliance on it, unless it was made with intent that the plaintiff should act in reliance on it in the manner in which he did act. He who tells lies is not responsible to the whole world for the consequences of them. The only person entitled to rely on a statement and to act accordingly is he who is intended to rely on it and to act upon it by the person making it. All others accept it at their own risk, and if they come to harm, must blame their own credulity only. Thus in *Peek v. Gurney*²⁷ it was held that a person who in reliance on a fraudulent prospectus issued by promoters, bought shares in the market and so suffered loss, had no cause of action against the promoters: for the purpose of a prospectus is to induce persons to apply to the company for shares, not to induce them to buy in the market shares already issued. The plaintiff, therefore, had acted in a manner not intended, and had relied on the false statement for a purpose that was foreign to it.^{28 29}

It is not necessary that the false statement should be made with intent that any specific individual should be deceived and act in reliance on it. A representation may be made to the public at large with intent that any member of the public may act on it, and in this case liability will be incurred towards any person so acting.³⁰

Nor need there be any intention to cause loss to the plaintiff; the only necessary intent is that the plaintiff shall be deceived and shall act in a certain way; and if, as the natural

²⁷ (1873) L.R. 6 H.L. 377.

²⁸ A fraudulent prospectus, however, may be intended to be acted on by way of the purchase of shares in the market; it may, for example, be a device to raise the price of the shares. In such a case any member of the public buying shares in the market in reliance on it will have a good cause of action. *Andrews v. Mockford* (1896) 1 Q.B. 372.

²⁹ See also *Barry v. Croskey* (1861) 2 J. & H. 1; *Edgington v. Fitzmaurice* (1885) 29 Ch.D. 459. pp. 478, 482.

³⁰ *Andrews v. Mockford* (1896) 1 Q.B. 372.

and probable result of so acting, any damage is suffered by him, the defendant is responsible for it, whether he meant that damage to ensue or not. "It is wholly immaterial," says Bowen, L. J.,³¹ "with what object the lie is told, . . . but it is material that the defendant should intend that it should be relied on by the person to whom he makes it."

**Apparent
intent.**

9. It is not enough, therefore, that it is the natural and probable consequence of the false statement, that the plaintiff will rely and act on it, if this was not the intention of the defendant. It would seem on principle, however, that it is enough if the defendant's *apparent* intention was that the plaintiff should act on his statement, whatever his real and concealed intention may have been. If the defendant makes a wilfully false statement which the plaintiff naturally and reasonably believes to be made to him with intent that he shall act in reliance on it in a certain manner, and he does so act, it would seem right that the defendant should be estopped from alleging that his apparent was not his real intention. Thus in *Richardson v. Silvester*³² the defendant falsely and to serve some purpose of his own, the nature of which does not appear from the report, advertised another person's farm as to let, and was held liable to the plaintiff who had acted in reliance on the advertisement and incurred expense in inspecting the premises.

**Reliance on
statement.**

10. No action will lie for a false statement unless the plaintiff did in fact rely and act upon it, even if he acted in the way intended by the defendant and suffered harm in consequence.³³ A mere attempt to deceive is not actionable. Thus in *Horsfall v. Thomas*³⁴ the defendant sold a cannon to the plaintiff, having first concealed a flaw in it by inserting a plug. The purchaser, however, bought the cannon without making any examination of it, and it was held in consequence that the contract had not been obtained by fraud. It is sufficient, however, that the false statement was *one* of the reasons which induced the plaintiff to act as he did. "If," says Fry,

³¹ *Edgington v. Fitzmaurice* (1885) 29 Ch.D. p. 482.

³² (1873) L.R. 9 Q.B. 34.

³³ *Macleay v. Tait* (1906) A.C. 24; *Nash v. Calthorpe* (1905) 2 Ch. 237.

³⁴ (1862) 1 H. & C. 90.

L.J.,³⁵ "the false statement of fact actually influenced the plaintiff, the defendants are liable, even though the plaintiff may have been also influenced by other motives." Nevertheless, if the plaintiff, although he relied on the statement, would have acted as he did, even had the statement not been made, he will have no cause of action.³⁶

11. If the statement is actually relied on, it is no defence that the plaintiff was negligent or foolish in doing so, or that he had a full opportunity of discovering the truth for himself. Every man has in law a right to believe and act on all lies told him by others with intent to deceive him.³⁷ Negligent reliance.

12. *Representations as to Credit.* There is one kind of false statement which, by reason of an anomalous rule of statute law, is no ground of action unless made in writing, namely a representation as to the credit of a third person. This exception is established by Lord Tenterden's Act,³⁸ by which it is provided that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (*sic*),³⁹ unless such representation or assurance be made in writing signed by the party to be charged therewith." Representations as to credit.
Lord Tenterden's Act.

The purpose of this enactment was to prevent the evasion of the fourth section of the Statute of Frauds (which requires a guarantee to be in writing) by suing on a verbal guarantee in an action of tort instead of contract. and alleging that the defendant had made a false and fraudulent representation as to the credit or financial ability of the debtor. A writing, therefore has been made essential for the tort as well as for the contract.⁴⁰

³⁵ *Edgington v. Fitzmaurice* (1885) 29 Ch.D. at p. 485.

³⁶ *Macleay v. Tail* (1806) A.C. 24.

³⁷ *Redgrave v. Hurd* (1881) 20 Ch.D. 1.

³⁸ 9 Geo. IV. c. 14, s. 6.

³⁹ This is evidently a clerical error in the Act. See *Lyde v. Barnard*

1 M. & W. p. 115, 46 R.R. p. 282.

⁴⁰ *Lyde v. Barnard* (1836) 1 M. & W. p. 114; 46 R.R. p. 281.

The signature of an agent is not sufficient, for the Act requires the personal signature of the defendant himself.⁴¹ This is so even when the defendant is a body corporate—although in such a case no signature except that of an agent is possible. Thus an incorporated bank is not responsible for a fraudulent representation as to credit made by a manager of one of its branches.^{42 43}

§ 149.—Injurious Falsehood.

Injurious
falsehood dis-
tinguished
from deceit.

1. We proceed now to the consideration of the second form of actionable misrepresentation, namely that which we have termed Injurious Falsehood.¹ The wrong of deceit consists, as we have seen, in false statements made to the plaintiff himself, whereby he is induced to act to his own loss. The wrong of injurious falsehood, on the other hand, consists in false statements made to other persons concerning the plaintiff, whereby he suffers loss through the action of those others. The one consists in misrepresentations made *to* the plaintiff, the other in misrepresentations made *concerning* him.

Injurious
falsehood
defined.

It may be stated as a general rule that it is an actionable wrong maliciously to make a false statement respecting any person with the result that other persons deceived thereby are induced to act in a manner which causes loss to him.

Distin-
guished from
defamation.

2. This wrong of injurious falsehood is to be distinguished not only from the wrong of deceit, but also from that of defamation, to which it is analogous, but from which it is distinct. Both in defamation and injurious falsehood the defendant is liable because he has made a false and hurtful statement respecting the plaintiff, but in the one case the statement is an attack upon his reputation, and in the other it is not. A statement which injures the plaintiff in his reputation is governed by the very stringent rules of libel and slander, but a statement which injures him only by misleading other

⁴¹ *Swift v. Jewsbury* (1874) L.R. 9 Q.B. 301.

⁴² *Hirst v. West Riding Union Banking Co.* (1901) 2 K.B. 560.

⁴³ As to what amounts to a representation as to *credit* within the meaning of the Act, see *Lyde v. Barnard* (1836) 1 M. & W. 101, 46 R.R. 269, and *Bishop v. Balkis Consolidated Co.* (1890) 25 Q.B.D. 512.

¹ *Supra*, p. 417.

persons into action that is detrimental to him, falls within the more lenient rule of liability which we are now considering.²

3. The following cases illustrate the nature of this form of Illustrations. injury. In *Ratcliffe v. Evans*³ the defendant was held liable in damages for having falsely and maliciously published in a newspaper a statement that the plaintiff had ceased to carry on business, in consequence of which statement the plaintiff's trade fell off. Bowen, L. J., says⁴: "That an action will lie for written or oral falsehoods not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce actual damage, is established law." So in *Riding v. Smith*⁵ an action was held to lie against a person who caused loss of custom to the plaintiff by falsely slandering the character of his wife, who assisted him in his business. In the old case of *Shepherd v. Bateman*⁶ damages were recovered by a woman who had lost her marriage by reason of a false statement by the defendant that she was already married to another. So in *Casey v. Arnott*⁷ an action was brought for the false statement that the plaintiff's ship was unseaworthy, in consequence of which statement the crew refused to go to sea in her.

4. An important variety of this species of injury is that Slander of title. known as slander of title, namely, a false and malicious denial of the plaintiff's title to property—as, for instance, when a sale by auction is defeated or prejudiced by an adverse claim made to the property by the defendant, or when the plaintiff's trade is affected by a false charge that the goods offered by him for sale are an infringement of a patent or copyright.⁸

² *Malachy v. Soper* (1836) 3 Bing. N.C. 371, 43 R.R. 691; *Ratcliffe v. Evans* (1892) 2 Q.B. 524; *White v. Mellin* (1895) A.C. 154.

³ (1892) 2 Q.B. 524.

⁴ At p. 527.

⁵ (1876) 1 Ex.D. 91

⁶ (1661) 1 Sid. 79.

⁷ (1876) 2 C.P.D. 24.

⁸ *Smith v. Spooner* (1810) 3 Taunt. 246, 12 R.R. 645; *Malachy v. Soper* (1836) 3 Bing. N.C. 371, 43 R.R. 691; *Pitt v. Donovan* (1813) 1 M. & S. 639, 14 R.R. 535; *Green v. Button* (1835) 2 C.M. & R. 707, 41 R.R. 818; *Stewart v. Young* (1870) L.R. 5 C.P. 122; *Halsey v. Brotherhood* (1882) 19 Ch.D. 386; *Wren v. Weild* (1869) L.R. 4 Q.B. 730; *Pater v. Baker* (1847) 3 C.B. 831.

Slander of
goods.

5. Another example of the wrong of injurious falsehood is a false and malicious depreciation of the quality of the merchandise manufactured and sold by the plaintiff.⁹ No action however, will lie for any statement, however false or malicious, which is nothing more than a statement by one trader that his goods are better than those of a rival. This is a special exception to the general rule of liability for injurious falsehood—an exception established to prevent traders from using litigation as a means of advertisement.¹⁰ It is otherwise, however, with a specific allegation of some defect in the plaintiff's goods, even though made by a rival with the view of promoting the sale of his own.¹¹

Misleading
trade
descriptions.

6. The most important example of the wrong of injurious falsehood is the use of fraudulent or misleading trade names, marks, or descriptions, whereby the defendant induces the public to believe that his merchandise or business is really that of the plaintiff, a rival trader. This particular form of injurious falsehood, however, is so far governed by special rules of its own that it is advisable to treat it separately, and it will be considered in the next succeeding section.

Conditions
of liability.

7. In order to maintain an action for slander of title or other injurious falsehood it is necessary for the plaintiff to prove (1) that the statement was untrue, (2) that it has been the cause of actual damage,¹² and (3) that it was published maliciously. "I am of opinion," says Lord Davey in *Royal Baking Powder Co. v. Wright Crossley & Co.*¹³ "that this is not an action for libel or defamation of character. I think it can only be maintained as an action for what is called slander of title, *i.e.*, an action on the case for maliciously damaging the plaintiffs in their trade by denying their title to the use of a certain label, and threatening to sue their customers.

⁹ *White v. Mellin* (1895) A.C. 154; *Linotype Co. v. British Empire Type Setting Co.* (1899) 81 L.T. 331; *Alcott v. Millar's Karri Forests Ltd.* (1905) 91 L.T. 722.

¹⁰ *White v. Mellin* (1895) A.C. 154; *Hubbuck & Sons v. Wilkinson* (1899) 1 Q.B. 86; *Evans v. Harlow* (1844) 5 Q.B. 624, 64 R.R. 596; *Young v. Macrae* (1862) 3 B. & S. 264.

¹¹ *Alcott v. Millar's Karri Forests Ltd.* (1905) 91 L.T. 722.

¹² *White v. Mellin* (1895) A.C. 154.

¹³ (1901) 18 Pat. Cas. Rep. 95 at p. 99.

To support such an action it is necessary for the plaintiff to prove : (1) that the statements complained of were untrue ; (2) that they were made maliciously, *i.e.*, without just cause or excuse ; (3) that the plaintiffs have suffered special damage thereby."

It is not very clear, however, what is meant by the term Malice. malice in this connection. Lord Davey in the passage already cited defines it as meaning the absence of just cause or excuse, but there is no authority as to what amounts to just cause or excuse. It is obvious that if the statement is wilfully false it must be malicious, whatever meaning we attach to that ambiguous term ; but the question remains unsettled how far, if at all, a person is liable for doing harm by means of a statement which he honestly believes to be true. Does his liability then depend on the motive with which the statement is made, or on the existence of some sufficient occasion of duty or interest for the making of it, or on the existence of reasonable and probable cause for believing it to be true. The earlier cases show a tendency to import into the law of injurious falsehood the same distinction between privileged and unprivileged occasions as exists in the law of defamation.^{14 15}

§ 150.—Deceptive Trade Names, Marks, and Descriptions.

1. To sell merchandise or carry on business under such a name, mark, description, or otherwise in such a manner, as to mislead the public into believing that the merchandise or business is that of another person, is a wrong actionable at the suit of that other person. This form of injury is commonly, though awkwardly, termed that of *passing off* one's goods or business as the goods or business of another. It is, as we have said, merely a specialised variety of the wrong of injurious falsehood. The law on this matter is designed to protect traders against that form of unfair competition which consists in

The wrong of passing off.

¹⁴ See the cases cited in Note 8, p. 427, *supra*.

¹⁵ By 46 & 47 Vict. c. 57, sec. 32 it is made a statutory tort to cause loss to anyone by making threats of legal proceedings in respect of alleged infringements of patent rights, unless the allegations of infringement are true, or the proceedings so threatened are commenced and prosecuted with due diligence.

acquiring for oneself, by means of false and misleading devices, the benefit of the reputation already achieved by rival traders

Species of
this wrong.

2. The wrong of passing off assumes many forms, of which the following are the most important :—

(a) *A direct statement that the merchandise or business of the defendant is that of the plaintiff.* Thus it is an actionable wrong to seek to sell a publication by falsely putting the name of a well known author on the title page.¹

(b) *Trading under a name so closely resembling that of the plaintiff as to be mistaken for it by the public.* Thus in *Hendriks v. Montague*² the Universal Life Assurance Society obtained an injunction preventing a company subsequently incorporated from carrying on business under the name of the Universe Life Assurance Association.³

(c) *Selling goods under a trade name already appropriated for goods of that kind by the plaintiff, or under any name so similar thereto as to be mistaken for it.*⁴ A trade name means a name under which goods are sold or made by a certain person, and which by established usage has become known to the public as indicating that those goods are the goods of that person. A trade name is opposed to a merely *descriptive* name, namely one under which goods are sold, but which indicates merely their nature, and not that they are the merchandise of any particular person.

(d) *Selling goods with the trade mark of the plaintiff or any deceptive imitation thereof attached thereto.* A trade mark is at common law any mark habitually attached by a trader to goods manufactured or sold by him, in order to indicate that they are his merchandise, and by established usage known to

¹ *Lord Byron v. Johnston* (1816) 2 Mer. 29 ; 16 R.R. 135. As to the unauthorised use of a person's name for other purposes, see *Dockrell v. Dougall* (1899) 80 L.T. 556.

² (1881) 17 Ch.D. 638.

³ See also *Manchester Brewery Co. v. North Cheshire and Manchester Brewery Co.* (1899) A.C. 83 ; *Pinet & Cie v. Maison Louis Pine* (1898) 1 Ch. 179 ; *Tussaud v. Tussaud* (1890) 44 Ch. D. 678 ; *Panhard et Levassor v. Panhard Levassor Motor Co.* (1901) 2 Ch. 513.

⁴ *Wotherspoon v. Currie* (1872) L.R. 5 H.L. 508 ; *Powell v. Birmingham Vinegar Brewery Co.* (1896) 2 Ch. 54 ; *Montgomery v. Thompson* (1891) A.C. 217 ; *Massam v. Thorley's Cattle Food Co.* (1890) 14 Ch.D. 748.

the public as possessing that significance. At common law there is no difference between the law of trade names and that of trade marks. A trade mark is an identifying sign attached to goods, and a trade name is an identifying name under which the goods are sold ; but each is at common law protected by exactly the same rule, namely that no trader must by his use of any name, mark, description, or in any other way, pass off his goods as those of another.⁵ The statute law as to the infringement of registered trade marks does not exclude or supersede this principle of the common law. Common law actions for passing off and statutory actions for infringement are concurrent remedies, and the law as to each remains independent of that as to the other.⁶

(e) *Imitating the get-up or appearance of the plaintiff's goods, so as to deceive the public.* When there is anything so characteristic in the get-up or appearance of the plaintiff's goods, that it identifies those goods as the merchandise of the plaintiff, any deceptive adoption or imitation of that get-up or appearance is subject to the same rules as the deceptive adoption or imitation of his trade name or trade mark.⁷

3. It is not necessary, in an action for passing off, to prove fraud, that is to say, an intent to deceive. It is sufficient in all cases to prove that the practice complained of is calculated, that is to say, likely, to deceive. At common law, indeed, it was necessary to prove an actual fraudulent intention.⁸ In equity, however, it was first established in *Millington v. Fox*⁹ that this is not so, and that it is an actionable wrong to do anything which to the knowledge of the defendant will in fact deceive the public, even though such deception is not desired or intended. To put the matter in another way, it is a sufficient fraud knowingly to continue any practice, the actual effect of which is so to deceive the public as to appropriate to

Fraudulent
intent not
necessary.

⁵ *Millington v. Fox* (1838) 3 My & Cr. 338 ; 45 R.R. 271.

⁶ Trade Marks Act, 1905, s. 45 : " Nothing in this Act contained shall be deemed to affect rights of action against any person for passing off goods as those of another person or the remedies in respect thereof."

⁷ *Massam v. Thorley's Cattle Food Co.* (1880) 14 Ch.D. 748. ; *Weingarten v. Bayer* (1905) 92 L.T. 511 ; *Payton & Co. v. Snelling & Co. Ltd.* (1901) A.C. 308.

⁸ *Crawshay v. Thompson* (1842) 4 M. & G. 357 ; 61 R.R. 541.

⁹ (1837) 3 My. & Cr. 338 ; 45 R.R. 271.

oneself the trade of a rival. Since *Millington v. Fox* this principle has been repeatedly approved and adopted, and has now superseded the narrower doctrine of the common law.¹⁰

Actual deception or damage not necessary.

4. Nor is it necessary even at common law to prove any actual deception or actual resulting damage.¹¹ It is sufficient to prove that the practice complained of is of such a nature that it is likely in the ordinary course of business to deceive the public.¹² This is sufficient for an injunction in equity, and even for nominal damages at common law. In the common form of statement that the practice must be calculated to deceive, the word calculated means not necessarily intended but merely likely. There need be no deception, actual or probable, of the immediate purchasers of the goods. It is sufficient if the ultimate deception of the public is probable, as when the wholesale dealer puts into the hands of the retail dealer goods so marked, named, or got up, as to be likely or intended to be used as an instrument of public deception.¹³ In considering whether deception is probable, account is to be taken not of the expert purchaser, but of the ordinary ignorant and unwary member of the public.¹⁴

Remedies.

5. The remedies of the plaintiff in an action for passing off are (1) an injunction, and (2) either damages or an account of profits, at the plaintiff's option. But no damages or account of profits will be granted in respect of innocent user before actual notice of the plaintiff's right. In this respect the right of a trader to be protected against deceptive competition is not like a right of property, an infringement of which, however innocent, will give rise to an action for damages.¹⁵

Descriptive name may become a trade name.

6. A name originally merely descriptive, and therefore *publici juris*, may by exclusive use in connection with the

¹⁰ *Singer Machine Manufacturers v. Wilson* (1877) 3 A.C. p. 391, *per* Lord Cairns; *Cellular Clothing Co. v. Maxton* (1899) A.C. p. 334, *per* Lord Halsbury.

¹¹ *Blofeld v. Payne* (1833) 4 B. & Ad. 410; 38 R.R. 270.

¹² *Reddaway v. Bentham Hemp Spinning Co.* (1892) 2 Q.B. p. 644, *per* Lindley, L.J.,

¹³ *Lever v. Goodwin* (1887) 36 Ch.D. 1.

¹⁴ *Singer Manufacturing Co. v. Loog* (1882) 8 A.C. p. 18, *per* Lord Selborne; *Johnston v. Orr Ewing* (1882) 7 A.C. 219.

¹⁵ *Edelstein v. Edelstein* (1863) 1 De G. J. & S. 185.

plaintiff's goods acquire a secondary sense as the trade name of those goods, and will then become subject to the ordinary rule as to trade names; so that the use of it by other persons ceases to be *publici juris*, and is actionable unless they take sufficient precautions to prevent deception.

A leading authority on this matter is the decision of the House of Lords in *Reddaway v. Banham*¹⁶. In this case the plaintiffs had for some years been the sole manufacturers of material which they called camel hair belting. The defendants commenced the manufacture of the same material, which they sold by the same name without attempting in any way to distinguish it from the plaintiff's manufacture. In an action for an injunction the defence was that the name was not a trade name, which could be appropriated as a monopoly by the plaintiffs, but was merely a descriptive name truly stating the nature of the material, and that since the defendants were entitled to make and sell this material, they must also be entitled to sell it by its true and only name. It was found by a jury, however, that the term camel hair belting had by long and exclusive association with the plaintiffs' manufacture come to mean not merely belting made from camel hair, but belting made by the plaintiffs. It had acquired a secondary sense, and had thereby become a trade name; and it was held by the House of Lords that for this reason it could not be used by other persons, unless they took adequate precautions against deceiving the public by means of it.

Similarly in *Montgomery v. Thompson*¹⁷ a name originally merely descriptive of goods by reference to the locality of their manufacture, namely *Stone Ale*, was held to have acquired through long exclusive use the secondary sense of ale brewed in that locality by the plaintiff, and to be entitled accordingly to the protection accorded to an ordinary trade name. So also in *Wotherspoon v. Currie*¹⁸ the term *Glenfield Starch* was held to have become a trade name, to which the plaintiffs had an exclusive right, and to be no longer merely descriptive of the locality in which the starch was made, and so *publici juris*.

It is to be remembered, however, that though it is possible for an individual by long and exclusive use thus to acquire

¹⁶ (1896) A.C. 199.

¹⁷ (1891) A.C. 217.

¹⁸ (1872) L.R. 5 H.L. 508.

a practical monopoly, as a trade name, of words which in their primary sense are merely descriptive and *publici juris*, the burden of proving this secondary sense is not a light one. The courts will not be easily persuaded to sanction such appropriation of words which belong to the common stock of our language.²⁰

7. In most, if not all, of the cases in which a descriptive name has been protected as a trade name because of an acquired secondary sense, there has been evidence of actual fraud — evidence not merely that deception was caused, but that the name was used in order that the deception might be so caused. It has been suggested that in such cases fraud is essential; that in the absence of fraud every person is at liberty truly to describe his merchandise by reference to its nature or purposes or the locality from which it comes, careless whether this description deceives the public or not.²¹ It seems, however, that this is not so, and that fraud is not essential in these cases any more than in the case of a name which is primarily a trade name, and not descriptive at all. If a descriptive name has acquired a secondary sense, which makes it an instrument of deception when used *simpliciter*, it must not be used *simpliciter*, but only with adequate precautions to avoid deception, and the resources of the English language are not so scanty as to make this a serious burden.

Trade name
may become
merely
descriptive.

8. A name which is originally a trade name may, through general use, cease to indicate specifically the merchandise of any particular person, and may so become merely descriptive and *publici juris*.²² This is the converse of the rule which we have just considered, to the effect that a descriptive name may by exclusive use change its character and become a trade name. Thus Leibig's Extract of Meat no longer means a material prepared by Leibig or his assigns,²³ nor does Harvey's

²⁰ Compare, for example, with the cases already cited the cases of *Cellular Clothing Co. v. Maxton* (1899) A.C. 326, and *Grand Hotel Co. of Caledonia Springs v. Wilson* (1904) A.C. 103.

²¹ See, for example, *Cellular Clothing Co. v. Maxton* (1899) A.C. p. 339, *per* Lord Shand.

²² See *Powell v. Birmingham Vinegar Co.* (1896) 2 Ch. p. 73, *per* Lindley, L.J.

²³ *Liebig's Extract of Meat Co. v. Hanbury* (1867) 17 L.T.N.S. 208.

Sauce mean a sauce sold by the original maker of the article so called.²⁴ Unless the owner of a trade name is careful to guard it from general use, he will lose it by reason of its resulting reduction to a mere name of description.

9. It is probable that even the use by a man of his own personal name to describe his own merchandise or business is no exception to the ordinary rule of passing off, and that he must take all reasonable precautions to prevent deception by reason of the similarity of his name to that of some other person whose trade is of earlier establishment than his own. It was, indeed, long supposed that by reason of the decision in *Burgess v. Burgess*²⁵ the use by a man of his own true name was an exception to the general rule, and that every man was entitled to use his name as he pleased, without regard to the fact that he thereby deceived the public and obtained for himself the benefit of the trade reputation of a rival trader of the same or similar name. To make the use of a man's own name actionable, it was supposed that it was necessary to prove actual fraud—that is to say, an actual intention to deceive, as opposed to mere knowledge that deception was in fact likely or actual. The facts in *Burgess v. Burgess*²⁶ were that the plaintiff, Burgess the elder, had for many years sold a sauce which he called Burgess's Essence of Anchovies, and he sought an injunction to prevent his son, Burgess the younger, from selling a similar sauce under the same name. It was held that inasmuch as the defendant was merely using his own name to denote his own merchandise, he was guilty of no wrong.

Deceptive
use of a
person's own
name.

Recent decisions, however, seem to show that there is not in reality any such exception to the general rule as to passing off. In all probability actual fraud is no more essential here than in any other case, and it is the duty of every man, even in using his own name, to take sufficient precautions to distinguish it from the similar name of rival and earlier traders, so that he may not deceive the public to his own profit and those others' loss. In *Valentine Meat Juice Co. v. Valentine Extract Co.*²⁷ one Valentine was prohibited from using his own name to indicate the goods sold by him: "His main

²⁴ *Lazenby v. White* (1871) 41 L.J. Ch. 354, n.

²⁵ (1853) 3 De.G.M. & G. 896.

²⁷ (1900) 83 L.T. 259.

defence," says Collins, L.J.,²⁹ "was that so long as he used his own name, which was the real source of the deception, his position could not be impugned. Now from that I absolutely dissent. . . . It is immaterial whether the deception arises from the use of a name which is, as it happens, the name of the defendant, or whether it arises from the use of any other description which in a sense may be accurate of that which he sells. For if the article which he sells has come to be known in the market as meaning something made by somebody other than himself, it is impossible for him to sell it *simpliciter* by that name, although it be his own, without misleading purchasers."²⁹

If this is so, *Burgess v. Burgess* and the subsequent cases, such as *Turton v. Turton*,³⁰ in which defendants have been held entitled to use names identical with or similar to that of the plaintiffs, must be regarded as merely findings of fact, to the effect either that there was no sufficient proof of deception, or that sufficient precautions had been taken to prevent deception. However this may be, it is certain that in case of actual fraud the use of a man's own name to indicate his own goods is an actionable wrong. Thus in *Croft v. Day*³¹ two men called Day and Martin entered into partnership for the purpose of manufacturing blacking under the name of Day and Martin's blacking, in order thereby to obtain the benefit of the established reputation of the original firm of Day and Martin. An injunction was granted to restrain any such fraudulent device.

Forms of
deception
which are
not action-
able.

10. The rule as to passing off is not to be extended to cases in which there is no appropriation by one man of the trade reputation or custom of another, but merely some other form of loss or inconvenience caused by the deception of the public. In the absence of actual fraud no action will lie in such a case. Thus in *Day v. Brownrigg*³² the plaintiff and defendant occupied adjoining villas, and the defendant changed the name of his residence, and gave it the same name as that of the plaintiff. An injunction to prevent this was refused, although

²⁹ At p. 271.

³⁰ See also *Cash Limited v. Joseph Cash* (1902) 86 L.T. 211.

³¹ (1889) 42 Ch.D. 128.

³² (1843) 7 Beav. 84; 64 R.R. 18.

³³ (1878) 10 Ch.D. 294.

it was proved that inconvenience would result to the plaintiff through the confusion thus caused. Had the parties been rival traders, the result would have been different. Similarly in *Street v. Union Bank of Spain*³³ the plaintiff had long used as his telegraphic address the words *Street London*, but he failed to obtain an injunction against the defendant bank, which had recently adopted the same address, with resulting confusion and loss to the plaintiff in his business. Here, also, there was no passing off, because the businesses of the two parties were entirely distinct in nature.³⁴

³³ (1885) 30 Ch.D. 156.

³⁴ Actions for the infringement of registered trade marks are closely related to actions for passing off, but constitute a branch of statute law which, like the law of patents and copyrights, is of too special a nature to admit of adequate treatment in a general treatise on the law of torts. It is advisable, however, to indicate here its essential characteristics, and to set out as definitely as may be, without entering into details, its true relation to the common law of passing off.

The law as to trade marks is now contained in the Trade Marks Act, 1905. A trade mark validly registered under this Act becomes thereby a species of incorporeal property analogous to a patent or copyright, and conferring upon the proprietor an exclusive right to the use of it in respect of the classes of goods in relation to which it is registered (s. 39). The use of it or of any deceptive imitation of it by any other person is *per se* an actionable infringement of the statutory monopoly so created. The common law, on the other hand, recognised no monopoly or right of property in the use of any name, mark, or other trade description. The cause of action in a common law action for passing off was not the infringement of any monopoly or right of property vested in the plaintiff, but damage done to the plaintiff in his business by the deceptive mode in which the defendant carried on his own. In other words, at common law the use of the plaintiff's trade mark was never in itself any cause of action, but was merely one of several means by which the wrong of deceiving the public to the plaintiff's prejudice might be committed.

A trade mark is defined in the Act as "a mark used or proposed to be used upon or in connection with goods, for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale." (s. 3.) The term mark in this definition is itself defined as including any "device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof." (s. 3.)

A title to a trade mark can be obtained only by registration, it being provided by sect. 42 of the Act that "no person shall be entitled to institute any proceedings to prevent or to recover damages for the infringement of an unregistered trade mark." This provision, however,

does not exclude or affect the common law as to actions for passing off, for by section 45 it is provided that "nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as those of another person or the remedies in respect thereof." The statutory remedy for the infringement of a registered trade mark, and the common law remedy for passing off goods, whether by the deceptive use of a trade mark (registered or unregistered) or otherwise, are therefore concurrent and independent.

Only certain classes of trade marks are capable of registration under the Act, and all others must necessarily stand outside the protection of the Act, and can only be made the subject of a common law action for passing off. (s. 9.)

CHAPTER XVI.

INTIMIDATION.

§ 151.—Intimidation of a Person to his own Injury.

1. The wrong of intimidation includes all those cases in which harm is inflicted by the use of unlawful threats whereby the lawful liberty of others to do as they please is interfered with.¹ This wrong is of two distinct kinds, for the liberty of action so interfered with may be either that of the plaintiff himself, or that of other persons with resulting damage to the plaintiff. In other words, the defendant may either intimidate the plaintiff himself, and so compel him to act to his own hurt, or he may intimidate other persons, and so compel them to act to the hurt of the plaintiff. We have already seen that the wrong of fraud or misrepresentation is divisible into two kinds on the same principle, for the defendant may either deceive the plaintiff himself, or deceive other persons to the plaintiff's injury.

2. *Intimidation of the plaintiff himself.* Although there seems to be no authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of illegal action, to do some act whereby loss accrues to him. For example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal violence made against him by the defendant with that intention. "In my opinion," says Hawkins, J., advising the

¹ It is to be remembered in connection with the wrong of intimidation that by the Trade Disputes Act, 1906, trade unions have been exempted from all liability for their illegal acts. *Supra*, p. 57. There is nothing therefore to prevent such a body from exercising any form of coercion or oppression which it pleases.

House of Lords in *Allen v. Flood*,² “any menacing action or language, the influence of which no man of ordinary firmness or strength of mind can reasonably be expected to resist, if used or employed with intent to destroy the freedom of will in another, and to compel him, through fear of such menaces, to do that which it is not his will to do, . . . amounts to an attempt to intimidate and coerce; and if such attempt is successful, . . . the person wrongfully injured by it . . . may sue the coercer for reparation in damages.”³

In such a case, however, it is clear that the threat complained of must be a threat to do an act which is in itself illegal. No threat to exercise one's legal rights can amount to a cause of action, even if made for the purpose of intimidation or coercion, and even if inspired by malicious motives.⁴

§ 152.—Intimidation of a Person to Another's Injury.

Intimidation
of other
persons to
the injury of
the plaintiff.

1. In certain cases it is an actionable wrong to intimidate other persons with the intent and effect of compelling them to act in a manner which causes loss to the plaintiff. We leave out of account in this connection all cases in which the act so procured to be done by the third person is itself a wrongful act as against the plaintiff: as when A by threats coerces B into committing a tort against C, or into breaking a contract with him. For the liability of A in such a case does not depend specifically on the fact of intimidation, but generically on the fact of procurement in whatsoever fashion. To procure the commission of a tort or the breach of a contract is itself a tort, apart from any question as to intimidation.⁵ We are here concerned with intimidation which constrains third persons to do acts against the plaintiff *which they themselves have a legal right to do*: for example, the intimidation of the plaintiff's customers, whereby they are compelled to withdraw their

² (1898) A.C. p. 17.

³ See also *Mogul Steamship Co. v. McGregor, Gow & Co.* (1889) 23 Q.B.D. p. 614, *per* Bowen, L.J.

⁴ *Allen v. Flood* (1898) A.C. 1

⁵ *Supra* p. 75; *Infra*, § 158.

custom from him, or the intimidation of an employer, whereby he is compelled to discharge his servant, the plaintiff.

Intimidation of this sort is actionable, as we have said, in certain classes of cases ; for it does not follow that, because a plaintiff's customers have a right to cease to deal with him if they please, other persons have a right as against the plaintiff to compel his customers to do so. There are at least two cases in which such intimidation is certainly a cause of action :

- (a) When the intimidation consists in a threat to do or procure an illegal act ;
- (b) When the intimidation is the act not of a single person, but of two or more persons acting together in pursuance of a common intention : or in other words, when the intimidation assumes the form of a conspiracy.

We shall deal with these two cases in their order.

2. *Intimidation by threats of illegal action.* Any person is <sup>Threats of
illegal action.</sup> guilty of an actionable wrong, who, with the intention and effect of intimidating any other person into acting in a certain manner to the harm of the plaintiff, threatens to commit or procure an illegal act. Thus in *Tarleton v. McGauley*⁷ two British ships, the *Othello* and the *Bannister*, were lying near each other off the coast of Africa, engaged in trading with the natives. A canoe manned by natives approached the *Bannister* for the purpose of trading, when the master of the *Othello*, with the intention of preventing this, fired a cannon at the canoe, and killed one of the crew, creating thereby such a panic among the natives that they ceased to trade with the *Bannister*. An action was successfully brought against the master of the *Othello* for the loss thus sustained by the owners of the *Bannister*. So in *Lyons v. Wilkins*⁸ the intimidation of the plaintiff's workmen by means of picketing during the progress of a strike was restrained by injunction (picketing of this description then being a criminal offence under the Conspiracy and Protection of Property Act, 1875) ; and on proof of actual damage, no doubt an action for damages would have lain.⁹

⁷ (1793) 1 Peake 270 ; 3 R.R. 689.

⁸ (1896) 1 Ch. 811 ; (1899) 1 Ch. 255.

⁹ See now the Trade Disputes Act, 1906, sec. 2.

Conspiracy
to intimi-
date.

3. *Intimidation by way of conspiracy.* It is an actionable wrong for two or more persons to combine or conspire together without lawful justification, with the intention and effect of doing harm to the plaintiff by intimidating other persons and coercing them to act in a certain way. Where this element of combination or conspiracy exists, it is not necessary that the intimidation should amount to a threat of illegal action. Any threat to inflict harm upon the persons so intimidated if they do not act in the way desired amounts to actionable intimidation within the meaning of this rule. The essence of the wrong consists in the combination of two or more persons to exercise their legal power over other persons for the purpose of compelling them to do harm to the plaintiff.

Quinn v.
Leathem.

This principle was established by the House of Lords in the leading case of *Quinn v. Leathem*.¹⁰ The plaintiff was a butcher who had a dispute with the trade union of which the defendants were officials, with respect to the employment of certain workmen who did not belong to the union. The defendants requested the plaintiff to discharge these men, but he refused. Whereupon, with a view of compelling him to do so, the defendants compelled the plaintiff's chief customer to cease to deal with him, by threatening that otherwise they would call out that customer's workmen. The plaintiff was held entitled to sue the defendants for damages for the loss which he had sustained through the withdrawal of his customer.

So in *Giblan v. National Amalgamated Labourers' Union*¹¹ the plaintiff was a member and former official of the union, and owed them certain moneys which he had misappropriated from their funds. In order to compel him to make restitution the union determined to prevent him from obtaining employment, and repeatedly procured his dismissal from different employments, by threatening his employers with a strike if they continued to employ him. It was held by the Court of Appeal that this was a good cause of action within the rule in *Quinn v. Leathem*. "A combination," says Romer, L.J.,¹² "of two or more persons, without justification, to injure a

¹⁰ (1901) A.C. 495.

¹¹ (1903) 2 K.B. 600.

¹² *Ibid.*, p. 618.

workman by inducing employers not to employ him or to continue to employ him is, if it results in damage to him, actionable."¹³

4. Intimidation which is *prima facie* unlawful within the rule in *Quinn v. Leathem* may be the subject of some special justification applicable to the particular class of case. What amounts to a justification is a question of law for the court, not of fact for the jury, and as the law at present stands no complete answer can be given to it.¹⁴ It may be regarded as settled, however, that no mere honesty of purpose—no mere absence of malicious motive—amounts to a justification, and conversely that if a justification does otherwise exist no form of malice or improper motive will destroy it.¹⁵

It must be held a sufficient justification that the act complained of was one done in the just and reasonable defence of

¹³ *Temperton v. Russell* (1893) 1 Q.B. 715, is a similar case, the decision of which was expressly approved by the House of Lords in *Quinn v. Leathem*, though the reasons for the decision are no longer valid since *Allen v. Flood* (1898) A.C. 1—being based on the assumption that the right of action in such cases is founded on the malicious motive of the defendant.

The rule in *Quinn v. Leathem* is quite independent of the rule in *Bowen v. Hall* (1881) 6 Q.B.D. 333, *infra* Ch. XVIII, as to the wrong of inducing a breach of contract, although these two species of wrongs are often found in combination.

The earlier case of *Allen v. Flood* (1898) A.C. 1, is in its actual facts indistinguishable from *Quinn v. Leathem*, yet the decision of the House of Lords was different. The explanation of this apparent conflict is that *Allen v. Flood* was not decided by the House of Lords on the actual facts at all, but on the facts as found by the verdict of a jury. No case of combination or conspiracy was made out by the plaintiff; he proved nothing except the isolated act of a single defendant, and the only finding of the jury was that the defendant maliciously induced the plaintiff's employers to discharge him from their employment. The decision of the House of Lords was merely that this fact alone did not amount to a cause of action. Merely to induce another to refrain from entering into a contract is not, in itself and without more, an actionable wrong; and it does not become actionable even if a jury finds that the act was inspired by malice. "The decision of this case," says Lord Macnaghten in *Allen v. Flood* (1898) A.C. p. 153, "can have no bearing on any case which involves the element of oppressive combination." See also *Quinn v. Leathem* (1901) A.C. p. 507, *per* Halsbury, L.C., and p. 532, *per* Lord Lindley.

¹⁴ See the observations of Romer, L.J., in *Giblan v. National Amalgamated Labourers' Union* (1903) 2 K.B. p. 618.

¹⁵ *Allen v. Flood* (1898) A.C. 1.

one's own rights and interests. Thus in *Mogul Steamship Co. v. McGregor Gow & Co.*¹⁶ the plaintiff alleged (*inter alia*) that the defendants, who were an associated body of traders in China tea, had wilfully caused loss to him, a rival trader, by compelling certain merchants in China to cease to act as his agents, by means of a threat that if they continued to do so the agency of the defendant association would be withdrawn from them. This was held by the House of Lords to be no cause of action, it being a justifiable measure of self protection on the part of the association, to prevent the same persons occupying the inconsistent positions of agents both for the association and for the plaintiff.

So it is submitted that if all an employer's servants except one combine to inform their employer that they will leave his employment unless that other is dismissed, and he is dismissed accordingly, the liability of his fellow servants to him will depend on whether there was or was not a justification of reasonable and lawful self-interest for their action. His want of care or skill, for example, may have been a source of danger to them.

Intimidation
in trade
disputes.

5. An important exception to the rule in *Quinn v. Leatham* has been established by the first section of the Trade Disputes Act, 1906, which provides that "an act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable." In the case, therefore, of acts done in contemplation or furtherance of a trade dispute, as defined by this statute, the element of conspiracy or combination is irrelevant and is no ground of liability.

Is a con-
spiracy not
to deal with
a person
actionable
at his suit ?

6. *Quinn v. Leatham* and the other similar cases that have been cited leave open a number of important and difficult questions on which there is not as yet any conclusive authority. One of these is this: Is a combination or conspiracy not to make contracts with or otherwise deal with a particular person actionable at the suit of *that person himself*? *Quinn v.*

¹⁶ (1802) A.C. 25.

Leathem decides merely that it is actionable at the suit of a third person who has been intentionally injured by the coercion thus exercised upon another, namely his employer, servant, or customer. To take a concrete case: A's servants combine and threaten to leave him unless he ceases to deal with B, and in consequence of this threat he ceases to deal with him, with resulting loss both to himself and to B. If B sues these servants he has a good cause of action within the rule in *Quinn v. Leathem*. But can A himself sue them? It is submitted that he can not. To hold otherwise would be to make a strike an actionable wrong against a master in all cases in which no reasonable and lawful justification for it can be proved to the satisfaction of the court. This can scarcely be the law. It would seem that the right of combination between workmen to refuse to work is, as against their employer, absolute, and that it makes no difference what the purpose or motive of their action is. Whether a man's workmen combine against him in a strike for the just and reasonable purpose of raising their own wages, or for the malicious purpose of imposing undeserved ruin upon him, is indifferent in law. But if, on the other hand, their purpose is to coerce their master into doing harm to some third person, then that third person has a cause of action within the rule in *Quinn v. Leathem*. For he can make against the servants a charge which their master cannot make: *viz.*, that by their wilful act they have deprived him of an advantage to which, as against them, he had a legal right—that is to say, the continuance of profitable commercial relations between their master and himself. Servants in combining for any purpose to leave their master's employment deprive him of no right which is his, but merely exercise their own.

It is true that this liberty of combination may be the means of much oppressive and unjust action. The law, if this is a correct account of it, gives its sanction not only to strikes for which there is no moral justification, but to other forms of harmful combination which can serve no good purpose, and are merely instruments of unjust mischief: for example, a combination among the employers in a trade not to employ a certain workman, a combination among the inhabitants of a village to have no dealings with some unpopular

resident, or a combination among medical men to hold no communion with a certain member of the profession. These things are lawful, however morally unjustifiable, for to hold otherwise would involve the law in impracticable inquiries as to the motives with which men exercise their legal rights.¹⁷

Combination
obtained by
compulsion.

It is to be remarked, however, that this exemption from legal liability attaches to combinations, only so long as they are purely voluntary. Any element of compulsion for the purpose of promoting combination or securing unanimity will at once bring the case within the principle of *Quinn v. Leathem*. Apart from the Trade Disputes Act, 1906, a strike at once becomes unlawful, even against the master, if any threats of harm (even lawful harm) are used by the strikers to compel dissentient or reluctant workmen to leave their work, or to prevent other workmen from taking the place of the strikers. "A combination not to work," says Lord Lindley in *Quinn v. Leathem*¹⁸ "is one thing and is lawful. A combination to prevent others from working by annoying them if they do, is a very different thing, and is *prima facie* unlawful." Similarly if a case of boycotting can be proved to be more than a voluntary combination—if the combination has been in any degree the outcome of compulsion exercised on those who took part in it—it becomes thereby an illegal and actionable conspiracy within the authority of *Quinn v. Leathem*.

Is combina-
tion essential
in the rule
in *Quinn v.*
Leathem?

7. A second question which still remains undecided is this : Is the element of combination really essential to a cause of action within the rule in *Quinn v. Leathem* ? Would not the same class of acts for which the defendants were held liable in that case be equally actionable had they been done by a single person, without any conspiracy, combination, or agreement for joint action with others ? Is it not a tort for *one* person intentionally and without lawful justification to do harm to the plaintiff by threatening other persons with harm unless they withdraw their service, custom, or employment from him ? If this is so, the fact of combination is not essential to the cause of action, but is merely a circumstance of aggravation in-

¹⁷ See for example *Kearney v. Lloyd* (1890) 26 L.R. Ir. 268.

¹⁸ (1901) A.C. p. 538.

creasing the oppressiveness and the effectiveness of the compulsion thus exercised and the magnitude of the evil done by it.

For this wider interpretation of the rule in *Quinn v. Leathem* there is much to be said both on principle and authority, and it is submitted that it is the true doctrine. It is adopted by Lord Lindley in *Quinn v. Leathem*¹⁹ itself, and the same view is expressed by Romer, L.J., in *Giblan's case*²⁰: "I should be sorry to leave this case without observing that in my opinion it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of. In my judgment if a person who by virtue of his position or influence has power to carry out his design, sets himself to the task of preventing a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers or would-be employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered." So Stirling, L.J., speaking of the acts of the defendants in the same case says²¹: "I am far from satisfied that they are not such as to be illegal, even if done by a single individual."

The distinction between the harmful and oppressive nature of compulsion exercised by one person and of compulsion exercised by a combination of persons is merely one of degree, and though there is a very serious difference between the oppressive power of a single workman and that of a trade union having ten thousand members, there is no material difference between the power of one workman and that of two; yet it has never been suggested that a conspiracy of two persons is too small to be actionable under the rule in *Quinn v. Leathem*. A rule that would make the liability of a man for oppressive and mischievous coercion exercised by him over another depend on whether he acts singly or in combination with another individual, would seem based on too slight a difference to commend itself as rational. What is to be said, for example, of a

¹⁹ (1901) A.C. p. 538. †

²⁰ (1903) 2 K.B. p. 619.

²¹ (1903) 2 K.B. p. 623.

rule that would make a firm of two partners liable for an act which a single trader can do with impunity. Moreover, it is clear that a single person may by reason of great wealth or influence be able to exercise coercive power over others in a degree exceeding that which is possible even to a large combination of smaller men. Why should the combination be liable, while the single individual of even greater wealth and power goes free ?

*Allen v.
Flood and
Quinn v.
Leathem.*

8. It remains, however, to consider whether in view of the decision in *Allen v. Flood*²² it is possible now to hold that combination is unessential, and that coercion exercised by a single person is an actionable tort, for it may seem as if the element of conspiracy was the only ground of distinction between *Allen v. Flood* and *Quinn v. Leathem*. It is submitted that *Allen v. Flood* does not exclude this wider interpretation of *Quinn v. Leathem*. *Allen v. Flood*, if we regard the decision itself, and the essential reasons for it, and not merely unessential dicta, decides nothing more than is contained in the head note of the report, namely that the *motive* of an act is immaterial, that an act otherwise legal does not become illegal because of a malicious motive and that no act otherwise illegal is justified by the motive with which it is done. It was on exactly the opposite principle that the Court of Appeal decided the case ; the jury was directed that the liability of the defendant depended on whether he acted maliciously or not and they found that he had so acted ; the Court of Appeal approved of that direction and finding ; and it is this doctrine which has been authoritatively rejected by the decision of the House of Lords. Maliciously to induce persons not to deal with the plaintiff is a different thing from intimidating them without lawful justification from doing so. The first of these acts is innocent in accordance with *Allen v. Flood* ; the second is an actionable tort in accordance with *Quinn v. Leathem*.

General
principle
suggested.

9. If, then, this is the true interpretation of the rule in *Quinn v. Leathem*, that rule is not a special rule as to conspiracy, but is simply an extension of the established law as to intimidation to cover a threat of acts which, though not illegal, are nevertheless harmful. The principle may be formulated

²² (1898) A.C. 1.

as follows:—*In the absence of any lawful justification, any person or body of persons²³ is guilty of an actionable wrong by intimidating other persons by a threat of harm (lawful or unlawful) whereby they are intentionally coerced into causing harm to the plaintiff.*²⁴

10. By sec. 3 of the Trade Disputes Act, 1906, however, it is provided that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that . . . it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he will." Consequently, even on the wider interpretation of the rule in *Quinn v. Leathem* above suggested, acts done in contemplation or furtherance of a trade dispute are now exempted from its operation and made lawful by this enactment, however oppressive, injurious, and unjustifiable they may be.²⁵

²³ Except a trade union. Trade Disputes Act, 1906, sec. 4.

²⁴ In addition to the cases already cited the following may be referred to as bearing on the question of liability for intimidation and conspiracy. The law, however, is too uncertain to render their detailed consideration useful in this place. *Gregory v. Duke of Brunswick* (1844) 6 M. & G. 205, 953, 64 R.R. 897; *Jenkinson v. Neild* (1892) 8 T.L.R. 540; *Trollope v. London Building Trades Federation* (1895) 72 L.T. 342; *Huttlley v. Simmons* (1898) 1 Q.B. 181; *Boots v. Grundy* (1900) 82 L.T. 769; *Bulcock v. St. Anne's Master Builders' Federation* (1902) 19 T.L.R. 27. An exhaustive examination of the question will be found in the report of the Royal Commission on Trade Disputes and Trade Combinations. 1906 Cd. 2825.

²⁵ "If upon these facts," says Lord Halsbury speaking of the acts of the defendants in *Quinn v. Leathem* (1901) A.C. p. 506, "the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilised community." There is now no remedy.

CHAPTER XVII.

WRONGFUL PROCESS OF LAW.

In the case of legal proceedings which are erroneous, malicious, or otherwise wrongful, it is necessary to consider (1) the liability of the judges, magistrates, or other judicial officers, and (2) the liability of the parties. We must also distinguish between (1) the liability of the superior courts, and (2) that of inferior courts.

§153.—Liability of the Superior Courts of Justice.

Superior
courts free
from all
liability.

1. Although the question has never been authoritatively decided, it is probable that a judge of one of the superior courts is absolutely exempt from all civil liability for acts done by him in the execution of his judicial functions. This is certainly so in the case of a mere error or irregularity in respect of matters within the limits of his jurisdiction; for in this case, as we shall see, even the inferior courts are free from responsibility. It is also clearly established that so long as the jurisdiction of the court is not exceeded, a judge is not liable even for a malicious, corrupt, or oppressive exercise of that jurisdiction.¹ The remedy for judicial errors is some form of appeal to a higher court, and the remedy for judicial oppression or corruption is a criminal prosecution or the removal of the offending judge; but in neither case is he called on to defend his judgment in a suit for damages brought against him by an injured litigant.

Even for
excess of
jurisdiction.

2. When, however, the illegal act complained of is beyond the limits of the defendant's jurisdiction, it is not definitely settled whether a superior judge is free from liability; or

¹ *Anderson v. Gorrie* (1895) 1 Q.B. 668; *Scott v. Stansfeld* (1868) L.R. 3 Ex. 220; *Haggard v. Pelicier Freres* (1892) A.C. 61; *Fray v. Blackburn* (1863) 3 B. & S. 576.

whether, as in the case of inferior judges, he is civilly responsible for such an excess of jurisdiction. Probably, however, the rule of exemption is absolute and applies even in this case. A court of appeal may reverse his decision, but there is no court of first instance which has any authority to entertain an action against him, and to give judgment against him for damages because their opinion on the point decided by him differs from his.

In *Miller v. Seare*² it is said by De Grey, C.J. : " It is agreed that the judges in the King's superior courts of justice are not liable to answer personally for their errors in judgment. . . . In courts of special and limited jurisdiction . . . a distinction must be made. While acting within the line of their authority they are protected as to errors of judgment ; otherwise they are not protected. . . . The protection in regard to the superior courts is absolute and universal ; with respect to the inferior, it is only while they act within their jurisdiction." In the Irish case of *Taafe v. Downes*³ an action was brought in the Irish Court of Common Pleas against the Chief Justice of the Irish Court of King's Bench for an illegal arrest, and it was held by a majority of the judges that no action would lie against a judge of one of the superior courts.⁴

§ 154.—Liability of Inferior Courts of Justice.

1. Judges of an inferior court of record possess the same immunity as judges of the superior courts, so long only as they do not exceed their jurisdiction. Within the limits of their jurisdiction, however, their exemption from civil liability is absolute, extending not merely to errors of law and fact, but to the malicious, corrupt, or oppressive exercise of their judicial powers.¹ For it is better that occasional injustice

Inferior
courts
exempt
within the
limits of their
jurisdiction. ;

¹ (1773) 2 W. Bl. p. 1145.

² (1812) 3 Moore P.C. 36 n. ; 50 R.R. 14.

⁴ The same opinion prevails in the United States of America. See Am. & Eng. Encyc. of Law, vol. 17, p. 728, 2nd ed. In *Anderson v. Gorrie* (1895) 1 Q.B. 668, on the other hand, which was an action against the judges of the Supreme Court of a Colony, it seems to have been assumed by the Court of Appeal that the defendants would have been liable had they exceeded their jurisdiction.

¹ *Scott v. Stansfield* (1868) L.R. 3 Ex. 220 ; *Anderson v. Gorrie* (1895) 1 Q.B. 668 ; *Haggard v. Pelicier Freres* (1892) A.C. 61 ; *Doswell v. Impey* (1823) 1 R. & C. 163.

should be done and remain unredressed under the cover of this immunity, than that the independence of the judicature and the strength of the administration of justice should be weakened by the liability of magistrates to unfounded and vexatious charges of error, malice, or incompetence, brought against them by disappointed litigants.

Justices of the peace.

2. Probably a similar immunity is possessed even by those inferior courts which are not courts of record.³ There are many dicta, however, to the effect that justices of the peace (and therefore presumably other judicial officers whose courts are not of record) are liable for the malicious exercise of their judicial powers even within the limit of their jurisdiction.³ Section 1 of 11 & 12 Vict. c. 44 seems to assume that this is the law; for it provides that in any action against a justice of the peace for an act done within the limits of his jurisdiction, it shall be necessary to prove malice and the absence of reasonable and probable cause. There is, however, no case in which any such action has been maintained, and it would seem difficult to justify any such distinction between different classes of magistrates.⁴

Inferior courts liable for exceeding their jurisdiction.

3. A judge of an inferior court is civilly liable for any act done by him in excess of his jurisdiction and in the nature of a trespass against the person or property of the plaintiff or otherwise a cause of damage to him. Such a judge determines the limits of his own jurisdiction at his own peril, and (speaking generally) he will answer for any mistake; nor is it necessary for the plaintiff to prove any malice or want of reasonable or probable cause. The decision of an inferior judge that he possesses jurisdiction is not conclusive in his own favour; it does not lie within his jurisdiction to determine authoritatively the limits of it. His duty is to observe those limits, not to exercise the judicial function of deciding

³ See *Haggard v. Pelicier Freres* (1872) A.C. 61.

³ *Cave v. Mountain* (1840) 1 M. & G. p. 263, 56 R.R. p. 343; *Linford v. Fitzroy* (1849) 13 Q.B. p. 247, 78 R.R. p. 364; *Burley v. Bethune* (1814) 5 Taunt 580; *Taylor v. Nesfield* (1854) 3 E. & B. p. 730.

⁴ The point is considered but left open in *Gelen v. Hall* (1867) 2 H. & N. 379.

what they are. A superior court, on the other hand, is intrusted with the power of determining its own jurisdiction, and is no more answerable for a judicial error on this point than for a judicial error on any other. In *Doswell v. Impey* ⁵ it is said by Abbott, C.J. : "The general rule of law as to actions of trespass against persons having a limited authority . . . is plain and clear. If they do any act beyond the limit of their authority, they thereby subject themselves to an action of trespass, but if the act done be within the limit of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such action."

4. The distinction thus drawn between an excess of a magistrate's jurisdiction and a wrongful act within the limits of his jurisdiction is one which it is easier to state in general terms, than to define with accuracy or apply with precision. It may probably be said with truth, however, that a magistrate may exceed his jurisdiction in three ways :—

Meaning of
excess of
jurisdiction.

- (a) When he has no power to deal with the kind of matter brought before him : as when a single justice of the peace makes an order which should be made by two.
- (b) When he has no power to deal with the particular person concerned : for example, because that person has not been properly summoned before him, or is not resident within the local jurisdiction of the court.⁶
- (c) When, although there is jurisdiction over the matter and the person, the judgment or order given or made in the matter is of a kind which the magistrate has no power to give or make : as if he imprisons instead of fining, or imprisons for a longer period than the law permits.⁸

In all these cases the magistrate is liable as for an excess of jurisdiction. When, on the other hand, he has power to give the kind of judgment which he has given, against the person complaining of it, he is not liable merely because his judg-

⁵ (1823) 1 B. & C. at p. 169.

⁶ *Carratt v. Morley* (1841) 1 Q.B. 18, 55 R.R. 183; *Mitchell v. Foster* (1840) 12 A. & E. 472; *Caudle v. Seymour* (1841) 1 Q.B. 889, 55 R.R. 444; *Jones v. Gurdon* (1842) 2 Q.B., 600; *Houlden v. Smith* (1850) 14 Q.B. 841, 80 R.R. 415.

⁸ *Prichett v. Gratrex* (1846) 8 Q.B. 1020, 70 R.R. 721.

ment is erroneous in law or in fact,⁹ or because there has been some irregularity of procedure.¹⁰ Such an error or irregularity is merely a wrongful exercise of jurisdiction, not an excess of it.

Thus in *Brittain v. Kinnaird*¹¹ justices were empowered by statute to hear and determine charges of certain offences committed on board boats in the River Thames. The plaintiff was convicted by the defendants, and sued them in trespass on the ground that the vessel was not a boat within the meaning of the statute. It was held that they were under no liability, whether this was so or not. Their decision as to the nature of the vessel was, even if erroneous, merely a mistaken exercise of their jurisdiction, not an excess of it. They were empowered to determine judicially whether the vessel was a boat; and not merely to determine the other matters in question, *if* the vessel was a boat. "Whether the vessel in question," it is said,¹² "was a boat or no was a fact which the magistrate was to decide, and the fallacy lies in assuming that the fact which the magistrate has to decide is that which constitutes his jurisdiction." So in *Cave v. Mountain*¹³ justices of the peace were held not liable for imprisoning the plaintiff on insufficient and legally inadmissible evidence. A decision upon the evidence is within the jurisdiction of the magistrate who has jurisdiction to hear the case. So in *Linford v. Fitzroy*¹⁴ a justice of the peace was held not liable for a refusal to accept bail. Whether the bail offered was sufficient or not was a question the determination of which fell within the limits of his jurisdiction, and his decision was conclusive in his own favour. His duty was not a duty to accept bail *if* it was sufficient, but a duty to determine, in the exercise of his judicial discretion, whether it was sufficient or not. So in *Garnett v. Ferrand*¹⁵ a coroner was held not liable for removing the plaintiff from his court on the ground that he was disturbing the proceedings, although there was no reasonable or probable ground for this removal.

⁹ *Brittain v. Kinnaird* (1819) 1 B. & B. 432, 21 R.R. 680; *Linford v. Fitzroy* (1849) 13 Q.B. 240, 78 R.R. 358.

¹⁰ *Bott v. Ackroyd* (1859) 28 L.J.M.C. 207; *Penney v. Slade* (1839) 5 Bing. N.C. 319, 50 R.R. 698.

¹¹ (1819) 1 B. & B. 432; 21 R.R. 680. ¹² 1 B. & B. at p. 442.

¹³ (1840) 1 M. & G. 257; 56 R.R. 338.

¹⁴ (1849) 13 Q.B. 240; 78 R.R. 358.

¹⁵ (1827) 6 B. & C. 611; 30 R.R. 467.

The power of exclusion carries with it jurisdiction to decide conclusively whether the facts are sufficient to justify exclusion.¹⁶

5. When a magistrate exceeds his jurisdiction by reason of a mistake of *law*, his liability is absolute, being independent of any malice or negligence. He is bound at his peril to know the law as to his own powers.¹⁷ When, on the other hand, his mistake is one of *fact*, he is not liable unless he either knew or ought to have known the facts which deprived him of jurisdiction. There must, in other words, be either knowledge of the want of jurisdiction or an absence of any reasonable and probable cause for believing that jurisdiction existed.¹⁸ Thus if a magistrate imprisons a person who by reason of his residence outside the district of the court is not subject to his jurisdiction, he is liable if the mistake is one of law, but not liable if it is an excusable mistake of fact.^{19 20 21}

Distinction between mistake of law and of fact.

§ 155.—Malicious Prosecution and other Malicious Process.

1. Having considered the liability of magistrates and judges in the case of wrongful legal proceedings, it remains to deal with the liabilities of the parties to these proceedings. This matter must be considered under two heads, (1) Malicious proceedings and (2) Erroneous and irregular proceedings.

2. It is an actionable wrong to institute certain kinds of legal proceedings against another person maliciously and without reasonable and probable cause. The chief classes of

Kinds of malicious proceedings for which an action lies.

¹⁶ Cf. *Willis v. MacLachlan* (1876) 1 Ex.D. 376.

¹⁷ *Houlden v. Smith* (1850) 14 Q.B. 841; 80 R.R. 415.

¹⁸ *Pease v. Chaytor* (1861) 1 B. & S. 658, 3 B. & S. 620; *Calder v. Hall* (1839) 3 Moore P.C. 28, 50 R.R. 1; *Polley v. Fordham*, No. 2, (1904) 91 L.T.R. 525.

¹⁹ *Houlden v. Smith* (1850) 14 Q.B. 841; 80 R.R. 415.

²⁰ A judicial officer who in the particular instance acts in a merely ministerial capacity—in the performance of a ministerial duty as opposed to the exercise of a judicial discretion—is liable in the same manner as any other ministerial officer, and derives no protection from his judicial character.

²¹ The liability of justices of the peace for their judicial acts is modified by certain statutory provisions contained in 11 & 12 Vict. c. 44.

proceedings to which this rule of liability applies are the following :—

(a) *Malicious criminal prosecutions.* It is the wrong known as malicious prosecution to institute criminal proceedings against anyone, if the prosecution is inspired by malice and is destitute of any reasonable cause.¹

(b) *Malicious bankruptcy proceedings.* A similar liability attaches to him who maliciously and without reasonable cause petitions to have another person adjudicated a bankrupt.²

(c) *Malicious liquidation proceedings.* A malicious and groundless attempt to have a company wound up as insolvent is on the same principle an actionable tort.³

(d) *Malicious arrest.* Similarly it is an actionable injury to procure the arrest and imprisonment of the plaintiff by means of judicial process, whether civil or criminal, which is instituted maliciously and without reasonable cause. Thus in *Churchill v. Siggers*⁴ the plaintiff was a debtor against whom judgment had been duly obtained by the defendant, and who, although he had paid part of the judgment debt, was arrested by the creditor on a writ of *capias ad satisfaciendum* issued for the full amount of the debt. It was held that the plaintiff had a good cause of action for such an abuse of legal process. This species of wrong is to be distinguished from false imprisonment. False imprisonment is the act of the defendant himself or of a merely ministerial officer put in motion by him; under the old practice the appropriate remedy was a writ of trespass, and speaking generally neither malice nor want of reasonable and probable cause was or is required. But in malicious arrest the imprisonment is effected by or in pursuance of the valid order or judgment of a judge or magistrate; no action of trespass would lie; the remedy was in case for wrongfully abusing the process of the court; and there was and is no cause of action except on proof of malice and want of reasonable cause.

(e) *Malicious execution against property.* On the same principle it is an actionable wrong maliciously and without

¹ *Abrath v. N.E. Rly. Co.* (1883) 11 Q.B.D. 440.

² *Johnson v. Emerson* (1871) L.R. 6 Ex. 329.

³ *Quartz Hill Gold Mining Co. v. Eyre* (1883) 11 Q.B.D. 674.

⁴ (1854) 3 E. & B. 929.

reasonable and probable cause to issue execution against the property of a judgment debtor : for example, to seize his goods under a writ of *fiere facias*, after the judgment debt has been paid.⁵ This is not a trespass, for the judgment still stands and will support the writ of execution, but it is an actionable abuse of judicial process.

3. The bringing of an ordinary civil action (not extending to any arrest or seizure of property) is not a good cause of action, however unfounded, vexatious, and malicious it may be.⁶ The reason alleged for this rule is that an unfounded and unsuccessful civil action is not the cause of any damage of which the law can take notice. Even for the injury which baseless accusations made in a civil action may inflict upon the reputation of the defendant, it would seem that no action lies. It seems that a litigant may maliciously and without any reasonable ground make the gravest charges of fraud or other disgraceful conduct, without incurring any other liability than that of paying the costs of the proceedings. Ordinary civil actions.

To what classes of civil proceedings this rule of exemption applies is far from clear. Will an action lie at the suit of a person maliciously joined as a co-respondent in a divorce suit, or at the suit of a person against whom affiliation proceedings have been maliciously taken, or at the suit of a solicitor whom the defendant has maliciously endeavoured to have struck off the roll ? If malicious proceedings in bankruptcy are, as we have seen, a good cause of action, there seems no reason why a similar conclusion should not be drawn with respect to the proceedings mentioned.

4. In order that an action shall lie for malicious prosecution or the other forms of abusive process which have been referred to, there are the following conditions to be fulfilled : Conditions of liability.

- (a) The proceedings must have been instituted by the defendant ;
- (b) He must have acted without reasonable and probable cause ;

⁵ *Churchill v. Siggers* (1854) 3 E. & B. p. 937.

⁶ *Quartz Hill Gold Mining Co. v. Eyre* (1883) 11 Q.B.D. p. 689, *per* Bowen, L.J. : "The bringing of an action under our present rules of procedure and under our present law, even if it is brought without reasonable and probable cause and with malice, gives rise to no ground of complaint."

- (c) He must have acted maliciously ;
- (d) In certain classes of cases the proceedings must have been unsuccessful—that is to say, must have terminated in favour of the plaintiff now suing.

We shall deal with these requirements in their order.

Institution
of proceed-
ings.

5. The proceedings complained of by the plaintiff must have been instituted by the defendant ; that is to say, he must be the person who put the law in motion against the plaintiff. It is not necessary, however, that he should be a *party* to the proceedings. Thus an action for malicious abuse of process will lie against the solicitor who in his client's name has set the law in motion against the plaintiff.⁷ So in the case of malicious prosecution by way of indictment in the name of the King, the person liable is the prosecutor to whose instigation the proceedings are due. Instigating a prosecution is to be distinguished, however, from the act of merely giving information on the strength of which a prosecution is commenced by some one else in the exercise of his own discretion.⁸

Want of
reasonable^a
and probable
cause.

6. *Reasonable and probable cause.* No action will lie for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause.⁹ Reasonable and probable cause means a genuine belief based on reasonable grounds that the proceedings are justified. In a criminal prosecution, for example, the prosecutor must have believed on reasonable grounds that the probability of the guilt of the accused was sufficient to render a prosecution reasonable and justifiable. "I should define reasonable and probable cause," says Hawkins, J., in *Hicks v. Faulkner*,¹⁰ "to be an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily

⁷ *Johnson v. Emerson* (1871) L.R. 6 Ex. 329; *Gilding v. Eyre* (1861) 10 C.B.N.S. 592.

⁸ *Cohen v. Morgan* (1825) 6 D. & R. 8, 28 R.R. 533; *Fitzjohn v. Mackinder* (1860) 8 C.B.N.S. 78; *Dubois v. Keats* (1840) 11 A. & E. 329, 52 R.R. 361.

⁹ *Willans v. Taylor* (1829) 6 Bing. p. 186; 31 R.R. p. 381.

¹⁰ (1878) 8 Q.B.D. p. 171.

prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed." ¹¹ ¹²

7. The burden of proving the absence of reasonable and probable cause lies upon the plaintiff. It is not for the defendant to prove affirmatively as a defence that reasonable and probable cause existed. If, therefore, there is no sufficient evidence of the absence of such cause, judgment must be given for the defendant. ¹³

Burden of proof.

8. There is no reasonable and probable cause unless the defendant genuinely and honestly believed that the prosecution or other proceeding complained of was justifiable. "It would be a monstrous proposition that a party who did not believe the guilt of the accused should be said to have reasonable and probable cause for making the charge." ¹⁴ Even, however, if the defendant honestly believed the proceedings to

No reasonable cause without honest belief.

¹¹ See also *Broad v. Ham* (1839) 5 Bing. N.C. 722, 50 R.R. 843; *Turner v. Ambler* (1847) 10 Q.B. 252, 74 R.R. 278.

¹² In the phrase *reasonable and probable cause* the terms *reasonable* and *probable* are mere synonyms. This use of the term *probable* is one of the archaisms of legal diction and deserves a word of notice. *Probabilis causa* was an expression which was not unknown in classical Latin, and which became familiar in medieval usage. *Probabilis* means primarily provable—hence capable of being put to the test—hence reliable, approved, right, good, justifiable. Du Cange gives as synonyms of *probabilis* the terms *rectus, bonus, approbatus*. Similarly the term *probatio* meant both probation and approbation, both proving and approving. The Digest of Justinian speaks of *probabilis error* (D. 41. 10. 5.) namely, a mistake which is excusable because based on some reasonable ground, *justa causa erroris*. In the same sense we read of *justa et probabilis ignorantia* (Just. Inst. 3. 20. 10.) So *sententia probabilis* means a reasonable opinion (D. 14. 1. 1. 5.). So, coming back to the matter in hand, *probabilis causa* means a good reason—a ground of action which commends itself to reasonable men. We read in Tacitus, Annals VI. 14: *nullas probabiles causas longinquae peregrinationis adferebat*. See also D. 50. 5. 2. 7: *certi et receptis probabilibus causis*. Also C. 6. 21. 4. 2.

¹³ *Abrath v. N.E. Rly. Co.* (1883) 11 Q.B.D. 440, 11 A.C. 247. *Aliter* in an action of false imprisonment; *Hicks v. Faulkner* (1878) 8 Q.B.D. p. 170.

¹⁴ *Broad v. Ham* (1839) 5 Bing. N.C. p. 727, 50 R.R. p. 848. See also *Heslop v. Chapman* (1853) 23 L.J.Q.B. 49; *Turner v. Ambler* (1847) 10 Q.B. 252, 74 R.R. 278; *Willans v. Taylor* (1829) 6 Bing. 183, 31 R.R. 379.

be justified, there is no reasonable and probable cause unless this belief is based on reasonable grounds. This question is to be determined by reference to the facts actually known to the defendant, not to the facts as they actually existed. He who prosecutes when the facts known to him do not constitute reasonable and probable cause, cannot defend himself in an action for malicious prosecution, on the ground that there were other facts unknown to him which would have justified a prosecution.¹⁵ Conversely facts unknown to the prosecutor do not prevent the facts which were known to him from constituting reasonable and probable cause. Having regard, however, to the facts known to the defendant, he must show a reasonably sound judgment and use reasonable care in determining whether there are sufficient grounds for the proceedings instituted by him, and any failure to exhibit such judgment or care will be imputed to him as a want of reasonable and probable cause.¹⁶

Reasonable
cause a
question for
the judge.

9. The existence of reasonable and probable cause is a question for the judge, and not for the jury.¹⁷ This rule, however, is subject to the qualification that all preliminary questions of fact on which this ultimate issue depends are for

¹⁵ *Delegal v. Highley* (1837) 3 Bing. N.C. 950, 43 R.R. 877; *Turner v. Ambler* (1847) 10 Q.B. 252, 74 R.R. 278.

¹⁶ The circumstance that the mistake of the defendant is one of law and not of fact does not necessarily amount to proof of want of reasonable and probable cause. The duty of a prosecutor is merely to show due judgment, care, and discretion as to the guilt of the accused in law no less than in fact. *Phillips v. Naylor* (1859) 4 H. & N. 565. As to the protection afforded by the opinion of counsel, see *Ravenga v. Mackintosh* (1824) 2 B. & C. 693, 26 R.R. 521. "If a party," says Bayley, J., "lays all the facts of his case fairly before counsel, and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description."

¹⁷ *Panton v. Williams* (1841) 2 Q.B. 169, 57 R.R. 631; *Lister v. Perryman* (1870) L.R. 4 H.L. 521. So also in actions of false imprisonment. *Hailes v. Marks*, (1861) 7 H. & N. 56. This anomalous rule was established as a precaution against erroneous verdicts for the plaintiff—*per doubt del lay gents*. Reasonable and probable cause was withdrawn from the cognisance of juries, under the pretence that it was a question of law. The old practice was to plead specially the facts relied on as constituting reasonable and probable cause, and the sufficiency of them was determined on demurrer. *Pain v. Rochester*, Cro. Eliz. 871.

the jury. That is to say, the jury must find what the facts of the case were, as known to or believed by the defendant, and then the judge decides whether those facts constituted reasonable and probable cause : *viz.*, whether the defendant showed reasonable care and judgment in believing and acting as he did. Thus if the defendant alleges that he prosecuted the plaintiff because of certain information received from a third person, it is for the jury to say whether that information was really received by the defendant and whether it was really believed by him, and it is for the judge to decide whether, if it was so received and believed, it constituted a reasonable ground for the prosecution.¹⁸

This division of functions between judge and jury may be effected at the discretion of the judge in two ways. He may either direct the jury to find the facts specially, and then decide for himself on the facts so found whether there was reasonable and probable cause, or he may tell the jury that if they find the facts to be such and such, then there is reasonable and probable cause, and that if they find the facts to be otherwise, there is none, thus leaving the jury to find a general verdict on this hypothetical direction.^{19 20}

¹⁸ *Panton v. Williams* (1841) 2 Q.B. 169, 57 R.R. 631 ; *Lister v. Perryman* (1870) L.R. 4 H.L. 521.

¹⁹ *Abrath v. N.E. Rly. Co.* (1883) 11 Q.B.D. at p. 458, *per* Bowen, L.J.

²⁰ In some cases the question has been left to the jury whether the defendant took reasonable care to ascertain the facts. *Abrath v. N.E. Rly Co.* (1883) 11 Q.B.D. 79, 11 A.C. 247 ; *Brown v. Hawkes* (1891) 2 Q.B. 718. It is submitted, however, that this is an essential portion of the very question which is to be answered by the judge, and not a mere preliminary question to be answered by the jury. To leave such a question to the jury is to give them concurrent and equal power with the judge in deciding the question of reasonable and probable cause. As is pointed out by Cave, J., in *Brown v. Hawkes* (1891) 2 Q.B. p. 720 : " If such a question is to be put in every case, the result will be to transfer the decision of the question of what is reasonable and probable cause from the judge to the jury, except when the judge holds that there is an absence of such cause." If, for example, the prosecutor acted on information received, which, if true, proved the guilt of the accused, the question whether this amounted to reasonable and probable cause is identical with the question whether the prosecutor used due care in verifying that information, and it seems impossible to maintain that the first question is for the judge and the second for the jury. It is submitted that it is impossible to distinguish the question whether the

Malice.

10. *Malice*. No action will lie for the institution of legal proceedings, however destitute of reasonable and probable cause, unless they are instituted maliciously, that is to say, from some wrongful motive.²¹ Malice and absence of reasonable and probable cause must unite in order to produce liability. So long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability; and conversely if there are reasonable grounds for the proceedings (for example, the probable guilt of an accused person) no impropriety of motive on the part of the person instituting these proceedings is in itself any ground of liability.

Malice means the presence of some improper and wrongful motive—that is to say, an intent to use the legal process in question for some other than its legally appointed and appropriate purpose. “Malice in its widest and vaguest sense has been said to mean any wrong or indirect motive, and malice can be proved either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor.”²²

The proper motive or purpose of a prosecutor is to secure the punishment of a person whom he believes to be guilty of a crime, and thereby to procure for himself and others the benefit and protection of the criminal law. Malice in such a case means “some other motive than a desire to bring to justice a person whom he honestly believes to be guilty.”²³ A prosecution is malicious only if it is animated by a desire to use the criminal law for some purpose for which it is not in-

defendant showed reasonable care and judgment in ascertaining the facts, from the question whether he showed reasonable care and judgment in estimating the significance of the facts known to him, and that both questions are equally for the judge. See *Abrath v. N. E. Rly. Co.* (1886) 11 A.C. at p. 254, *per* Lord Bramwell. Cf. however, *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1884) 50 L.T. 274.

²¹ *Willans v. Taylor* (1829) 6 Bing. p. 186; 31 R.R. 382.

²² *Brown v. Hawkes* (1891) 2 Q.B. at p. 722. See also *Mitchell v. Jenkins* (1833) 5 B. & Ad. at p. 595; 39 R.R. p. 573. *Abrath v. N. E. Rly. Co.* (1883) 11 Q.B.D. p. 455.

²³ *Brown v. Hawkes* (1891) 2 Q.B. p. 723, *per* Cave, J.

tended: for example, the conviction or defamation of an innocent man, the levying of blackmail, the coercion of the accused in respect of some unconnected matter, the obtaining of compensation or restitution from the accused (the civil law, not the criminal, being the appropriate instrument for this purpose). A prosecution is not malicious merely because inspired by anger for the injury suffered. "It may, I think, be assumed," says Cave J. in *Brown v. Hawkes*,²⁴ "that the defendant was angry; but so far from this being a wrong or indirect motive, it is one of the motives on which the law relies to secure the prosecution of offenders against the criminal law."

11. The burden of proving malice lies on the plaintiff; Burden of and subject to two qualifications, the question is one for the jury, and not, like that of reasonable and probable cause, one for the judge.²⁵ The first of these qualifications is that the question whether any particular motive is a proper or improper motive for the proceeding in question is a matter of law for the determination of the judge. Malice is any motive of which the law disapproves, not any motive which is displeasing to a jury. The jury has merely to decide whether the motive exists. The second qualification is that there must be some reasonable evidence of malice, otherwise the case will be withdrawn from the jury.²⁶

Want of reasonable and probable cause is itself in certain cases sufficient evidence of malice to go to a jury. For "there may be such plain want of reasonable and probable cause, that the jury may come to the conclusion that the prosecutor could not honestly have believed in the charge he made, and in that case want of reasonable and probable cause is evidence of malice."²⁷ Nevertheless a jury is not at liberty in all cases to infer malice from want of reasonable cause. Want of reasonable cause is sufficient evidence of malice in those cases only in which it is sufficient evidence that there was no genuine belief in the accusation made. If it appears that there was such a belief, the plaintiff must produce some independent

²⁴ (1891) 2 Q.B. p. 722.

²⁵ *Mitchell v. Jenkins* (1833) 5 B. & Ad. 588; 39 R.R. 570.

²⁶ *Brown v. Hawkes* (1891) 2 Q.B. 718.

²⁷ *Brown v. Hawkes* (1891) 2 Q.B. p. 723.

evidence of malice, and cannot rely on the absence of reasonable cause.²⁸ On the other hand, malice is never evidence of want of reasonable cause. "From the most express malice, the want of probable cause cannot be implied."²⁹ For a prosecutor may be inspired by malice and yet have a genuine and reasonable belief in the truth of his accusation.

Termination
of proceed-
ings in favour
of the
plaintiff.

12. *Termination of the proceedings in favour of the plaintiff.*

No action for a malicious prosecution, or for any other malicious proceeding which involves a judicial decision of any question at issue between the parties, will lie until or unless the prosecution or other proceeding has terminated in favour of the person complaining of it. No person, for example, who has been convicted on a criminal charge can sue the prosecutor for malicious prosecution, even though he can prove that he is an innocent man, and that the accusation was a malicious and unfounded one.³⁰ Even if the prosecution or other proceeding is still pending, the same rule applies. "It is a rule of law that no one shall be allowed to allege of a still depending suit that it is unjust."³¹

If the prosecution has actually determined in any manner in favour of the plaintiff, it matters nothing in what way this has taken place. There need not have been any acquittal on the merits. What the plaintiff requires for his action is not a judicial determination of his innocence, but merely the absence of any judicial determination of his guilt. Thus it is enough if the prosecution has been discontinued,³² or if the accused has been acquitted by reason of some formal defect in the indictment,³³ or if a conviction has been quashed for some technical defect in the proceedings.³⁴

*Aliter in
proceedings
involving no
judicial
decision.*

13. This rule that the proceedings must not be still pending but must have terminated in favour of the plaintiff in the subsequent action, applies not only to malicious prosecution,

²⁸ *Brown v. Hawkes* (1891) 2 Q.B. 718.

²⁹ *Johnstone v. Sutton* (1786) 1 T.R. p. 544; 1 R.R. p. 291.

³⁰ *Baseé v. Matthews* (1867) L.R. 2 C.P. 684; *Castrique v. Behrens* (1860) 3 E. & E. 709.

³¹ *Gilding v. Eyre* (1861) 10 C.B. N.S. p. 604.

³² *Watkins v. Lee* (1839) 5 M. & W. 270; 52 R.R. 721.

³³ *Wicks v. Fentham* (1791) 4 T.R. 247; 2 R.R. 374.

³⁴ See *Johnson v. Emerson* (1871) L.R. 6 Ex. at p. 394.

but to all malicious proceedings which involve the judicial determination of any question at issue. Thus no action will lie for maliciously procuring the plaintiff to be adjudicated a bankrupt, until and unless the adjudication has been set aside.³⁵ But the rule does not apply to proceedings which involve no such judicial decision. Thus in *Gilding v. Eyre*³⁶ it was held that an action would lie for maliciously issuing a *ca. sa.* for a larger sum than remained due on the judgment, and that it was unnecessary to show that the execution had been set aside. The plaintiff in instituting his action for such a cause raised no question which had already been decided against him in a court of justice.³⁷

§ 156.—Erroneous and Irregular Proceedings.

1. Having considered the liability of litigants for the malicious abuse of legal process, it remains to consider how far they are responsible for mere errors and irregularities of procedure in the absence of any malice.

2. No action will lie against any person for procuring an erroneous decision of a court of justice. This is so even though the court has no jurisdiction in the matter, and although its judgment or order is for that or any other reason invalid. A court of justice is not the agent or servant of the litigant who sets it in motion, so as to make that litigant responsible for the errors of law or fact which the court commits. Every party is entitled to rely absolutely on the presumption that the court will observe the limits of its own jurisdiction and decide correctly on the facts and the law.

Thus in *Lock v. Ashton*¹ the defendant had wrongly, though honestly, arrested the plaintiff and charged him with an offence before a magistrate, who thereupon remanded him in custody. It was held that, although the defendant was liable for the original arrest (as being his own wrongful act), he was not responsible for the subsequent remand, which was merely

³⁵ *Metropolitan Bank v. Pooley* (1885) 10 A.C. 210. See also *Huffer v. Allen* (1866) L.R. 2 Ex. 15.

³⁶ (1861) 10 C.B. N.S. 592.

³⁷ See also *Stewart v. Gromell* (1859) 7 C.B. N.S. 191.

¹ (1848) 12 Q.B. 871 ; 76 R.R. 434.

an erroneous act of the magistrate. In *Brown v. Chapman*³ it is said : " If an individual prefers a complaint to a magistrate, and procures a warrant to be granted, upon which the accused is taken into custody, the complainant in such case is not liable in trespass for the imprisonment ; and that, even though the magistrate has no jurisdiction. . . . The imprisonment is referred to the magistrate's authority, so as to exempt the complainant from all liability in trespass." ³

No liability
for acting on
erroneous
decision

3. No action will lie against any person for issuing execution or otherwise acting in pursuance of a valid judgment or order of a court of justice, even though it is erroneous, and even though it is afterwards reversed or set aside for error. A valid judgment, however erroneous in law or fact, is a sufficient justification for any act done in pursuance of it. The remedy of an aggrieved litigant is some form of appeal, whereby the judgment may be reversed or set aside—not an action for damages against those who enforce or act on the judgment while it stands.

Thus in *Williams v. Smith*⁴ the defendant was held not liable for imprisoning the plaintiff on a writ of attachment which was subsequently set aside on appeal. " Where he relies upon the judgment of a competent court, however erroneous that judgment may be, the party acting upon the faith of it ought to be protected." ⁵ " The party causing process to be issued is not responsible for anything that is done under it, where the process is afterwards set aside, not for irregularity, but for error." ⁶ So in *Smith v. Sydney*⁷ the defendant had obtained judgment by default against the plaintiff for a larger sum than was actually due, and had issued execution. The judgment was set aside on application to a Master, and the plaintiff thereupon sued the defendant for damages. It was held that there was no cause of action.

Aliter with
the execution
of process
which is
invalid.

4. If any litigant executes any form of legal process which is invalid for want of jurisdiction, irregularity, or any other

³ (1848) 6 C.B. p. 376 ; 77 R.R. p. 355.

⁴ See also *West v. Smallwood* (1838) 3 M. & W. 418, 49 R.R. 666 ; *Austin v. Dowling* (1870) L.R. 5 C.P. 534.

⁵ (1863) 14 C.B. (N.S.) 596.

⁶ *Ibid.*, p. 625.

⁷ *Ibid.* p. 623.

⁸ (1870) L.R. 5 Q.B. 203.

reason, and in so doing he commits any act in the nature of a trespass to person or property, he is liable therefor in an action of trespass, and it is not necessary to prove any malice or want of reasonable or probable cause. This is an application of the fundamental principle that mistake, however honest or inevitable, is no defence for him who intentionally interferes with the person or property of another. A supposed justification is no justification at all. A litigant who effects an arrest or seizes property must justify the trespass by pleading a valid execution of legal process, and any irregularity or error which has the effect of making the process invalid, will deprive him of all justification. Thus in *Painter v. Liverpool Oil Gas Light Co.*⁸ justices of the peace, on the application of the defendants, issued a warrant of distress without jurisdiction, and the defendant executed that warrant against the plaintiff, and were held liable in damages. So in *Brooks v. Hodgkinson*⁹ the defendant, having obtained judgment against the plaintiff for less than £20, arrested him under a writ of *ca. sa.* issued in disregard of the statute which took away the writ in the case of judgments below that amount, and he was held liable in an action of false imprisonment.

5. When it is sought to hold a litigant thus liable for the execution of invalid process,[†] a distinction is to be drawn between process which is wholly void and process which is merely voidable. Process which is void is no defence at all, and an action will lie without taking any steps to set it aside.¹⁰ But when process is merely voidable, it is a sufficient justification until it has been set aside; though when it has been set aside, it becomes void *ab initio*, and an action will thereupon lie for acts done in pursuance of it. "The process when set aside, is as if it had never existed, and . . . the party therefore cannot justify under it."¹¹

⁸ (1836) 3 A. & E. 433; 42 R.R. 423. ⁹ (1859) 4 H. & N. 712.

¹⁰ *Brooks v. Hodgkinson* (1859) 4 H. & N. 712.

¹¹ *Codrington v. Lloyd* (1839) 8 A. & E. p. 453. See *Riddell v. Paheman* (1835) 2 C.M. & R. 30; *Blanchenay v. Burt* (1843) 4 Q.B. 707. Whether any particular irregularity makes process wholly void or only voidable is a question pertaining to the details of the procedure of the court in question. As to the High Court, see Order 70, Rule 1.

§ 157.—Maintenance.

Maintenance
defined.

1. To procure any person, by means of pecuniary assistance given to him for that purpose, to institute or carry on civil proceedings against another is, in the absence of lawful justification, a wrong actionable at the suit of that other, namely the wrong of Maintenance.

Thus in *Bradlaugh v. Newdegate*¹ the plaintiff had been unsuccessfully sued in a former action brought by one Clarke for the recovery of the statutory penalty for sitting and voting in Parliament without having taken the necessary oath. Clarke was a person of no means, and was unable to pay the plaintiff's costs. The action had been instigated and procured by the defendant, Newdegate, who had supplied the necessary funds and had given Clarke a guarantee against all expenses. It was held that the plaintiff was entitled to recover from the defendant, on the ground of unlawful maintenance, all the costs which he had incurred in the action brought against him by Clarke. So in *Alabaster v. Harness*² the defendant provided the funds for an action for libel brought by a third person against the plaintiff. The action failed, and the plaintiff was held entitled to sue the defendant for maintenance, and to recover as damages all the costs of the libel action.

Proceedings
maintained
must be civil.

2. The doctrine of maintenance applies solely to the instigation of *civil* proceedings. To set the criminal law in motion is the right of every member of the public, and is not actionable unless those conditions of liability exist which are required by the law of malicious prosecution.³

Justification
for main-
tenance.

3. It is a sufficient justification for what would otherwise be unlawful maintenance, that the defendant has or believes himself to have some lawful interest in the subject-matter of the suit maintained by him. Thus co-owners of property, or a landlord and his tenant may maintain one another in the defence of their common interests. Maintenance is the offence of promoting litigation with which one has no concern.⁴

¹ (1883) 11 Q.B.D. 1.

² (1895) 1 Q.B. 339.

³ *Grant v. Thompson* (1895) 72 L.T. 264.

⁴ *Findon v. Parker* (1843) 11 M. & W. 675, 63 R.R. 723; *Guy v. Churchill* (1888) 40 Ch.D. 481; *Bradlaugh v. Newdegate* (1883) 11 Q.B.D. at p. 11; *Alabaster v. Harness* (1895) 1 Q.B. 339.

4. It is also a sufficient justification that the defendant was actuated solely by charitable motives, *i.e.*, by a desire to assist a poor man to obtain justice that would otherwise be beyond his reach. If this was his honest purpose, there is no actionable maintenance, even though there was no reasonable and probable cause for bringing the action which he thus instigated.⁵

5. There may be other justifications for maintenance in addition to the two already mentioned, but it is impossible to say what they are. The modern law of maintenance is the atrophied survival of what in earlier days was a far reaching and important branch both of the civil and criminal law, and we cannot say with certainty how much of the old doctrine is still living and operative. The older authorities are no longer to be relied upon, and modern authority is scanty.

6. It is said in the old books that it is maintenance to assist the defence of an action, as well as to procure the institution of one, but there is no modern example of this form of the wrong.⁶ Maintaining a defendant.

7. It is possible that other forms of assistance than pecuniary help may amount to actionable maintenance, but there is no modern authority on the point. It has been decided, however, that the mere act of *procuring* or *instigating* the bringing of an action does not amount to maintenance.^{7 8} Instigating proceedings is not maintenance.

⁵ *Harris v. Briscoe* (1886) 17 Q.B.D. 504.

⁶ Coke, 2 Inst. 212: "Maintenance is an unlawful upholding of the demandant or plaintiff, tenant or defendant, in a cause depending in suit, by word, writing, countenance, or deed.

⁷ *Flight v. Leman* (1843) 4 Q.B. 883; 62 R.R. 495. The distinction suggested in this case between assisting the commencement of litigation and assisting the continuance of it has nothing to recommend it in principle, and has been disregarded in subsequent cases. *Alabaster v. Harness* (1895) 1 Q.B. 339.

⁸ For the older law as to the offence of maintenance reference may be made to Bacon's Abridg. *Maintenance*.

CHAPTER XVIII.

RESIDUARY FORMS OF INJURY.

§ 158.—Inducement of Breach of Contract.

Inducing a breach of contract is a tort.

1. Intentionally and without lawful justification to induce anyone to break a contract made by him with another is a tort actionable at the suit of that other, if damage has resulted to him. "A violation of legal right committed knowingly is a cause of action, and . . . it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference."¹ This may be termed the rule in *Bowen v. Hall*,² this being the first case in which it was definitely formulated as a general principle. The authority of this case was doubted in *Allen v. Flood*³ but has been definitely established by *Quinn v. Leathem*⁴ and *Glamorgan Coal Co. v. South Wales Miners' Federation*.⁵ In this last case damages were recovered by employers of labour against a trade union which had induced the plaintiffs' workmen to discontinue their work in breach of their contracts.⁶

Advice distinguished from inducement.

2. Is a person liable under this rule who merely *advises* a breach of contract, and in this wide sense may be said to *induce* it? Or is the term inducement used in a narrow sense to exclude mere advice? This is a question which cannot be definitely answered as the authorities stand. On principle it is submitted that mere advice is not actionable: as when a parent advises his daughter to break an engagement of marriage, or a physician advises a patient to break a contract

¹ *Quinn v. Leathem* (1901) A.C. at p. 510 *per* Lord Macnaghten.

² (1881) 6 Q.B.D. 333. See also *Lumley v. Gye* (1853) 2 E. & B. 216.

³ (1898) A.C. 1.

⁴ (1901) A.C. 495.

⁵ (1903) 2 K.B. 545. See also *Read v. Friendly Society of Stone-masons* (1902) 2 K.B. 732.

⁶ But see now the Trade Disputes Act, 1906, sec. 3.

of service for his health's sake. There must be an inducement in the strict sense—that is to say, the intentional creation of some inducing cause or reason for the breach of contract: for example, to induce a servant to leave his employment by an offer of higher wages, or by a threat to inflict some harm upon him, legal or illegal, if he continues in it. To *induce* a breach of contract means to create a reason for breaking it; to *advise* a breach of contract is to point out the reasons which already exist. The former is certainly actionable; the latter has never been held to be so, and is probably innocent.⁷

3. Malice, in the sense of improper motive, is not an essential element in this cause of action.⁸ It is sufficient that the breach of contract is induced knowingly and wilfully, and the reasons which animate the defendant are irrelevant. No jury is at liberty to find a verdict for the defendant, because in their opinion he was inspired by no improper motive in doing what he did. "No one," it has been said,⁹ "can legally excuse himself to a man of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or *bona fide*, or in the best interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage."

4. To induce a breach of contract is not actionable, if there is in the circumstances of the case a legal justification for such inducement.¹⁰ What amounts to a justification is a question of law, to which as the authorities stand no answer can be given. It has been suggested that it would be a good justification if, in inducing a breach of a contract made by A

⁷ The question is discussed in *Glamorgan Coal Co. v. South Wales Miners' Federation* (1903) 2 K.B. 545, a case, however, in which the Court of Appeal came to the conclusion that the act of the defendant was more than mere advice.

⁸ See *Quinn v. Leatham* (1901) A.C. p. 510, *per* Lord Macnaghten; *Read v. Friendly Society of Stonemasons* (1902) 2 K.B. 732; *Glamorgan Coal Co. v. South Wales Miners' Federation* (1903) 2 K.B. 545.

⁹ *Read v. Friendly Society of Stonemasons* (1902) 2 K.B. at p. 96, *per* Darling, J.

¹⁰ *Glamorgan Coal Co. v. South Wales Miners' Federation* (1903) 2 K.B. pp. 573, 576; *Quinn v. Leatham* (1901) A.C. p. 510.

with the plaintiff, the defendant was doing nothing more than insist on the performance of another and inconsistent contract previously made between himself and A.¹¹

Inducing
breach of
non-con-
tractual
obligation.

5. Presumably this rule of liability extends not merely to the inducement of breaches of contract, but also to the inducement of the breach of any obligation,¹² whether contractual in its origin or not: for example, the obligation which arises out of a judgment. There is, however, no authority on the point.

Exception in
case of trade
disputes.

6. An exception to the rule in *Bowen v. Hall* has been established by sec. 3 of the Trade Disputes Act, 1906, which provides that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment." The purpose of this enactment is to facilitate strikes by exempting those who instigate them from the necessity of respecting the contractual rights of the employers.

§ 159.—The Breach of Statutory Duties.

Damage
caused by
breach of
statutory
duty is
prima facie
actionable.

1. The breach of a duty created by statute, if it results in damage to an individual, is *prima facie* a tort, for which an action for damages will lie at his suit. The question, however, is in every case one as to the intention of the legislature in creating the duty, and no action for damages will lie, if on the true construction of the statute the intention is that some other remedy, civil or criminal, shall be the only one available.

Prima facie a statute which creates a duty creates at the same time a correlative right vested in the individuals for whose protection and benefit that duty has been imposed, and *prima facie*, therefore, those persons will have the ordinary civil remedy for the enforcement of that right, namely an action for damages in respect of any loss occasioned by the violation of it. Thus in *Groves v. Wimborne*¹ the defendant,

¹¹ *Read v. Friendly Society of Stonemasons* (1902) 2 K.B. p. 95.

¹² The term obligation is here used in its strict sense to mean a duty lying on a determinate individual. To induce the breach of a duty lying on persons in general is equivalent to breaking that duty oneself. *Qui facit per alium facit per se.*

¹ (1898) 2 Q.B. 402.

a manufacturer, was held liable in damages to one of his servants, who had sustained personal injuries through failure of the defendant to perform his statutory duty of fencing dangerous machinery. "It cannot be doubted," says Vaughan Williams, L.J.,² "that where a statute provides for the performance by certain persons of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie* and if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty." Similarly in *Couch v. Steel*³ it was held by the Court of Queen's Bench that the plaintiff, a sailor, had a good cause of action against the owners of the ship for injuries suffered by him in consequence of their failure to keep on board a supply of medicines in accordance with the provisions of the Merchant Shipping Act. It is true that the judgment in this case lays down a rule which is much too absolute and general, and which cannot be supported in view of later decisions, and for this reason the case has been the subject of adverse criticism.⁴ But there seems no sufficient reason to doubt, especially since *Groves v. Wimborne*,⁵ that the actual decision in *Couch v. Steel* is correct.

2. Notwithstanding the general rule, however, there are many cases in which no action for damages will lie in respect of injuries caused by the breach of a statutory duty. For there is no such remedy unless the legislature, in creating the duty, intended that it should be enforceable in this way; and there are at least two other alternatives. In the first place, the intention may be that there shall be no civil remedy available for an injured individual at all. The statutory duty is then a duty towards the public at large, and not towards individuals, and the correlative right is vested in the public and not in private persons, even though they may suffer special damage. The duty in such a case is to be enforced by way of a criminal prosecution, or by way of injunction at the suit of the Attorney

But this depends on the intention of the legislature.

² *Ibid.* p. 415.

³ (1854) 3 E. & B. 402.

⁴ *Atkinson v. Newcastle Waterworks Co.* (1877) 2 Ex. D. 441; *Cowley v. Newmarket Local Board* (1892) A.C. p. 352.

⁵ (1898) 2 Q.B. 402.

General, or in some other manner appropriate to the maintenance of a public right, and not by way of a private action for damages.

In the second place the legislature, even while recognising a private right vested in the injured individual, may intend that it shall be maintained solely by some special remedy provided for the particular case, and not by the ordinary method of an action for damages. Thus a pecuniary penalty recoverable by the injured party, either in criminal proceedings or in a penal action, may be established by the statute as the sole remedy available for the breach of it.

*Atkinson v.
Newcastle
Waterworks
Co.*

Thus in the leading case of *Atkinson v. Newcastle & Gateshead Waterworks Co.*⁶ it was held by the Court of Appeal, reversing the decision of the Court of Exchequer, that the defendant company was not liable in damages for the destruction of the plaintiff's house by fire, although its destruction was directly due to the failure of the defendants to perform the duty laid upon them by their private Act of Parliament to maintain a certain pressure of water in their water-pipes for the purpose of extinguishing fire. The statute in question provided that any breach of this duty should be an offence punishable by a fine of ten pounds, and the Court came to the conclusion that on the true interpretation of the statute the intention of the legislature was that this should be the sole remedy available, and that there was no intention of imposing on the water-works company any such heavy civil liability as the opposite interpretation would have subjected them to. Cockburn, C.J., says⁷: "I entirely agree with the Lord Chancellor in the conclusion at which he has arrived, that the particular Act which we have now before us does not by implication give to persons who may be injured by the breach of the duties thereby imposed any remedy over and above those which it gives in express terms. If, therefore, any person is injured by a breach of such duty, he must have recourse to the statutory remedy, and cannot maintain an action for damages."

So in *Vallance v. Falle*⁸ it was held that no action would lie for the refusal of a sea-captain to give a seaman his certificate of discharge in pursuance of the requirements of the

⁶ (1877) 2 Ex.D. 441.

⁷ *Ibid.*, p. 449.

⁸ (1884) 13 Q.B.D. 109.

Merchant Shipping Act, 1854. The Act provided for such a breach of duty a penalty of ten pounds, the whole or any part of which might be ordered to be paid to the informant by way of compensation, and the court came to the conclusion that this remedy was meant to be exclusive, and not concurrent with an action for damages. In *Saunders v. Holborn District Board of Works*⁹ it was held that the plaintiff had no remedy by action against the local sanitary authority for injuries caused through their failure to perform their statutory duty of removing snow from the streets. So also it is settled, as we have already seen,¹⁰ that no action will lie against local authorities for injuries caused through a failure to perform their statutory duty of keeping highways in repair.

3. An action for damages will not lie at the suit of an injured person, if he is not one of the persons for whose protection and benefit the statute was passed, or if the damage suffered by him is not of the kind intended to be guarded against. In *Gorris v. Scott*¹¹ the plaintiff sued the defendant, a shipowner, for the loss of sheep which had been swept overboard in consequence of the failure of the defendant to supply certain pens and other structures on the deck of his ship, for the accommodation of sheep, as required by Act of Parliament. It was held, however, that the defendant was not liable, because the purpose of the statute in question was to make provision against the spread of contagious disease among animals, and not to prevent such accidents as the plaintiff complained of. "When the damage is of such a nature as was not contemplated at all by the statute, and as to which it was not intended to confer any benefit on the plaintiffs, they cannot maintain an action founded on the neglect."¹²

4. Where a statute simply creates a new duty without expressly providing any remedy for the breach of it, the appropriate remedies are *prima facie* an indictment as for a misdemeanour, in respect of any injury to the public, and an action for damages in respect of any special damage suffered by an individual. But where a special remedy is expressly

Limits of liability for breach of statutory duty.

Action for damages may be excluded by special statutory remedy.

⁹ (1895) 1 Q.B. 64. Cf., however, *Guardians of Holborn Union v. Vestry of St. Leonards* (1876) 2 Q.B.D. 145. ¹⁰ *Supra*. p. 276.

¹¹ (1874) L.R. 9 Ex. 125.

¹² *Ibid.*, p. 128.

provided, it becomes a question whether this was not intended to be the only one, and to exclude by implication any resort to the common law. "Where in a statute of this kind," says Vaughan Williams, L.J., in *Groves v. Wimborne*,¹³ "a remedy is provided in cases of non-performance of the statutory duty, that is a matter to be taken into consideration for the purpose of determining whether an action will lie for injury caused by non-performance of that duty, or whether the legislature intended that there should be no other remedy than the statutory remedy; but it is by no means conclusive, or the only matter to be taken into consideration for that purpose." The weight to be attributed to this consideration will depend largely on whether the statutory remedy does or does not involve compensation to individual persons injured. Thus a pecuniary penalty payable wholly to the Crown has comparatively little significance in excluding an action for damages; but if the penalty goes or may go in whole or in part to the injured persons, much greater weight may rightly be attached to its existence. In neither case, however, is this consideration conclusive.¹⁴

Mens rea in the case of statutory duties.

5. When a duty is created by statute, the breach of which is an actionable tort, it is a question of construction whether the liability is absolute, or depends on wrongful intent or negligence on the part of the defendant. In other words, when a statute provides that a certain thing must be done, it is a question of interpretation whether this means that the thing is to be done in all events, or merely that the person upon whom the duty is imposed is to use due care and diligence in the endeavour to perform it, and that if he fails to perform it through no fault of his, he shall be free from liability.

In *Hammond v. Vestry of St Pancras*¹⁵ the defendants were held not liable in the absence of proof of negligence for failure to perform their statutory duty of keeping the sewers in order. "It would seem to me," says Brett, L.J.,¹⁶ "to be

¹³ (1898) 2 Q.B. p. 416.

¹⁴ See on this matter *Groves v. Wimborne* (1898) 2 Q.B. 402; *Athinson v. Newcastle Waterworks Co.* (1877) 2 Ex.D. 441; *Couch v. Steel* (1854) 3 E. & B. 402; *Vallance v. Falle* (1884) 13 Q.B.D. 109.

¹⁵ (1874) L.R. 9 C.P. 316.

¹⁶ *Ibid.* p. 322.

contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care or skill could obviate. . . . Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed." On the other hand in *Groves v. Wimborne*¹⁷ it was held that liability for a breach of the statutory duty to fence dangerous machinery was absolute and independent of any negligence on the part of the defendant or his servants.

§ 160.—The Breach of Common Law Obligations.

Most duties created by the common law, apart from contract, are negative duties imposed upon persons in general to abstain from various forms of hurtful activity. Occasionally, however, the common law is moved by special considerations to impose upon particular classes of persons positive duties to be fulfilled for the benefit of others. The breach of one of these common law obligations is generally a tort actionable at the suit of the person injured thereby. Thus a common carrier is bound to carry goods for all the members of the public. So an innkeeper is bound to afford the accommodation of his inn to all travellers who desire it. Any carrier¹ or innkeeper² violating his duty in this respect commits a tort against the person whose right he has so infringed.

Breach of common law obligations a tort.

§ 161.—Injuries to Immaterial Property.

The forms of immaterial property known to our law are patents, copyrights, registered trade marks, and the various franchises which may be vested in private persons, such as markets and ferries. A violation of any of these rights of property is an actionable tort. The law as to these matters is, however, too special in its nature to call for examination here.

Patents, copyrights, and trade marks.

¹⁷ (1898) 2 Q.B. 402.

¹ *Great Western Rly. Co. v. Sutton* (1869) L.R. 4 H.L. p. 237.

² *Lamond v. Richard* (1897) 1 Q.B. 541.

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